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ERISA—THE AWARDING OF INTEREST AS “OTHER APPROPRIATE EQUITABLE RELIEF” UNDER ERISA: THE THIRD CIRCUIT ENLARGES INTEREST RECOVERY IN *FOTTA v. TRUSTEES OF THE UNITED MINE WORKERS*

“If Justice were immediate, there would never be an award of prejudgment interest.”¹

I. INTRODUCTION

In 1974, Congress enacted the Employment Retirement Income Security Act of 1974 (ERISA),² which federalized laws governing privately sponsored employee benefit plans.³ Congress enacted ERISA to protect

1. Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 TEX. L. REV. 293, 294 (1996).

2. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in 29 U.S.C. §§ 1001-1461 (1994) and in scattered sections of 26 U.S.C.).

3. See HENRY H. PERRITT, JR., *EMPLOYEE BENEFIT CLAIMS LAW AND PRACTICE* § 5.1 (1st ed. 1990) (discussing scope of ERISA); Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise?*, 81 IOWA L. REV. 1, 4-5 (1995) (describing Congress' effort to codify ERISA). See generally Note, *Pension Plans and the Rights of the Retired Worker*, 70 COLUM. L. REV. 909 (1970) (chronicling history regarding pre-ERISA employee benefits law).

ERISA includes four titles. See 29 U.S.C. §§ 1001-1461 (1994). Title I establishes rules for the operation of employee benefit plans. See *id.* Title II articulates the tax-qualification rules for qualified retirement plans. See *id.* Title III relates to the federal government's administration and enforcement of ERISA. See *id.* Title IV establishes plan termination insurance and creates the Pension Benefit Guaranty Corporation to administer the insurance. See *id.*

The Supreme Court articulated that “ERISA was enacted ‘to promote the interests of employees and their beneficiaries in employee benefit plans’ and ‘to protect contractually defined benefits.’” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983) and *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985)). To promote this end, Congress chose not to mandate particular benefits under ERISA, but rather to govern the administration of employee benefit plans. See *Shaw*, 463 U.S. at 91. ERISA defines “employee benefit plan” to include both pension and welfare plans. See 29 U.S.C. § 1002(3).

ERISA defines an “employee pension benefit” plan as a plan that provides retirement income to employees or results in a deferral of income by employees to the termination of employment or beyond. See *id.* § 1002(2)(A). An “employee welfare benefit” plan includes any program that provides benefits to employees for

employees' rights to pension and welfare benefits and also to encourage the development of the private pension and welfare benefit system without excessively burdening it.⁴ To promote uniformity in pension plan admin-

contingencies such as illness, accident, disability, death or unemployment. *See id.* § 1002(1).

4. *See* Steven Davi, Note, *To Tell the Truth: An Analysis of Fiduciary Disclosure Duties and Employee Standing to Assert Claims Under ERISA*, 10 ST. JOHN'S J. LEGAL COMMENT. 625, 625-29 (1995) (exploring dual goals of Congress in enacting ERISA); Matthew S. Rotenberg, Note, *Fischer v. Philadelphia Electric Co.: The Third Circuit "Seriously Considers" the Fiduciary Duty to Disclose Potential Changes to an Employee Benefit Plan Under ERISA*, 42 VILL. L. REV. 1915, 1918-20 (1997) (discussing purposes of ERISA). Congress expressly articulated its purpose in the following manner:

[T]o protect . . . the interest of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1001(b).

Congress enacted ERISA after 10 years of work on pension and employee benefit issues. *See* Jeffrey A. Brauch, *The Danger of Ignoring Plain Meaning: Individual Relief for Breach of Fiduciary Duty Under ERISA*, 41 WAYNE L. REV. 1233, 1237-38 (1995) (explaining ERISA's background and legislative history). An impetus for ERISA's enactment was the reality that many employees who had been promised pensions were not, in fact, receiving them. *See id.* (citing 29 U.S.C. § 1001(a)). For example, after the closing of a Studebaker plant in South Bend, Indiana, "4,000 employees between the ages of forty and fifty-nine with at least ten years of service, and whose pensions had vested, received only fifteen cents on the dollar of their accrued benefits." *Id.* at 1238. Commentators viewed this incident as the "pivotal event in the history of the movement toward comprehensive federal regulation of private pension plans." JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 62 (2d ed. 1995).

Congress blamed plan fiduciaries for causing the failure by underfunding the plans. *See* Brauch, *supra*, at 1238. Congress determined that federal action was necessary to prevent fiduciary self-dealing, imprudent investing and misappropriation of funds. *See id.*; *see also* 120 CONG. REC. 29,934 (1974) (statement of Sen. Javits) ("The absence of any supervision over these funds and lack of minimum standards to safeguard the interests of plan participants and beneficiaries has over the years led to widespread complaints signaling the need for remedial legislation."); 120 CONG. REC. 29,949-50 (1974) (statement of Sen. Bentsen) (noting that proposed law will prevent abuses caused by underfunding because it sets minimum standards); 120 CONG. REC. 29,957 (1974) (statement of Sen. Ribicoff) (noting that employers make unwise investments or manipulate pension funds); 120 CONG. REC. 29,950 (statement of Sen. Bentsen) ("Government statistics indicate that during 1972 alone more than 15,000 pension plan participants lost retirement benefits because their pension plan terminated with insufficient assets to meet all plan obligations.").

Congress also aimed to alleviate the "maze of different and often conflicting state laws and regulations that resulted in administrative inefficiencies and costs that ultimately hurt plan participants." Brauch, *supra*, at 1238; *see also* 120 CONG. REC. 29,198 (1974) (statement of Rep. Ullman) (finding that "these new requirements have been carefully designed to provide adequate protection for employees and, at the same time, provide a favorable setting for the growth and development of private pension plans"); 120 CONG. REC. 29,210 (1974) (statement of Rep. Rostenkowski) (expressing that "[t]he goal of this legislation was to strengthen the

istration, ERISA preempts state regulation of employee benefit plans, and it grants federal courts exclusive jurisdiction to enforce its provisions.⁵

ERISA is silent, however, as to whether prejudgment interest may be awarded to a party prevailing in a lawsuit against the administrator of a pension fund.⁶ Although ERISA is silent with respect to the availability of prejudgment interest, it provides courts with discretion to award plan ben-

rights of employees under existing pension systems, while at the same time encouraging the expansion of these plans and the creation of new ones"); 120 CONG. REC. 29,945 (1974) (statement of Sen. Long) (observing that "[w]e know that new pension plans will not be adopted and that existing plans will not be expanded and liberalized if the costs are made overly burdensome, particularly for employers who generally foot most of the bill"); 120 CONG. REC. 29,949 (1974) (statement of Sen. Bentsen) (noting that "it is important to recognize that if minimum standards are set too high, we would discourage the creation of new plans"); 120 CONG. REC. 29,953 (1974) (statement of Sen. Nelson) (stating that "[i]n all its deliberations and decisions, Congress was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted").

5. See Peter J. Wiedenbeck, *Implementing ERISA: Of Policies and "Plan,"* 72 WASH. U. L.Q. 559, 565, 569-71 (1996) (discussing various aspects of ERISA preemption). See generally 60A AM. JUR. 2D *Pensions and Retirement Funds* §§ 99-135 (1988) (discussing aspects and instances of ERISA preemption of state law); Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35 (1996) (discussing cases addressing preemption under ERISA). Title I's regulatory and enforcement provisions preempt "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a) (1994). "State law" includes "all laws, decisions, rules, regulations, or other State action having the effect of law of any State." *Id.* § 1144(c)(1).

In addition to exercising exclusive jurisdiction over the enforcement of ERISA's requirements, federal courts also exercise concurrent jurisdiction with state courts over suits by a participant or beneficiary to enforce the terms of an ERISA-governed plan. See 29 U.S.C. § 1132(e)(1) (1994) (mandating concurrent jurisdiction).

6. See *Brown v. Hiatts*, 82 U.S. 177, 185 (1872) (defining interest). Interest is defined as "compensation allowed by law . . . for the use or forbearance of money, or as damages for its detention. . . ." *Id.* Prejudgment interest is interest accruing on monies owed from the date of the delayed payment up to the date of judgment. See JOHN Y. GOTANDA, *SUPPLEMENTAL DAMAGES IN PRIVATE INTERNATIONAL LAW* 1 (1998). For purposes of this Casebrief, prejudgment interest will be distinguished from "interest on delayed payments." Interest on delayed payments is interest that accrues absent underlying litigation under ERISA establishing entitlement to the funds. See *Fotta v. Trustees of the United Mine Workers*, 165 F.3d 209, 211 (3d Cir. 1998) (discussing this variant of interest). For a further discussion of these types of interest, see *infra* notes 16-29 and accompanying text.

ERISA is silent on whether interest may be awarded. See generally 29 U.S.C. §§ 1001-1461 (failing to create general power to award prejudgment interest under ERISA); ROBERT L. HAIG, *BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS* § 68.14 (1998) (noting ERISA's silence on availability of prejudgment interest awards). ERISA, however, does expressly provide courts with power to award prejudgment interest on delinquent employer contributions to a multi-employer plan. See 29 U.S.C. § 1132 (g)(2) (creating power to award prejudgment interest). For a discussion of plan administrators' attempts to use this clause in a statutory construction argument to rebut a general power to award prejudgment interest under ERISA, see *infra* notes 51-52 and accompanying text.

eficiaries "other appropriate equitable relief" to redress violations of ERISA or to enforce any ERISA provision.⁷ Several courts of appeals have used this discretion to award prejudgment interest to plan beneficiaries to fully compensate the party for delay in payments under ERISA plans.⁸ The United States Court of Appeals for the Third Circuit, however, has recently broken new ground by extending the rationale undergirding the payment of prejudgment interest and holding that interest may be awarded on delays in payment under ERISA benefits—even when no litigation under ERISA occurs to recover the payments.⁹ This new cause of

7. See 29 U.S.C. § 1132(a)(3)(B) (1994) (enumerating two instances courts may award "other appropriate equitable relief"). See generally Francis M. Dougherty, *What Constitutes "Other Appropriate Equitable Relief," Under §§ 502(a)(3)(B), 502(a)(5)(B) of Employee Retirement Income Security Act of 1974 (29 U.S.C.A. §§ 1132(a)(3)(B), 1132(a)(5)(B)), Which May be Obtained to Redress Violations, or to Enforce Provisions, of Act*, 98 A.L.R. FED. 705 (1990) (outlining judicial construction of provisions awarding various types of relief). For an introduction on litigating under ERISA, see generally DAVID M. COOK & TERESE M. CONNERTON, AMERICAN BAR ASSOCIATION CENTER FOR CONTINUING LEGAL EDUCATION NATIONAL INSTITUTE, *PROCEDURAL ASPECTS OF LITIGATING ERISA CLAIMS*, available in Westlaw, N98EBAB ABALGLED E-1 (1998); Frank Cummings, *ERISA Litigation: An Overview of Major Claims and Defenses*, SD09 ALI-ABA 97 (July 6, 1998); Michael J. Dell, *ERISA Litigation Issues*, 560 PLI/LIT 67 (1997).

8. See, e.g., *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 223 (1st Cir. 1996) (upholding availability of prejudgment interest under ERISA); *Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1328 (8th Cir. 1995) (holding that prejudgment interest is "other appropriate equitable relief" under ERISA); *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 286 (2d Cir. 1992) ("[A] court has wide discretion . . . to award prejudgment interest."); *Schake v. Colt Indus. Operating Corp. Severance Plan*, 960 F.2d 1187, 1192 n.4 (3d Cir. 1992) (noting that prejudgment interest is available in actions to recover benefits under ERISA); *Anhuis v. Colt Indus. Operating Corp.*, 971 F.2d 999, 1010 (3d Cir. 1992) (noting that prejudgment interest is available despite ERISA's silence); *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 752 (8th Cir. 1986) (recognizing availability of prejudgment interest under ERISA); *Shaw v. International Ass'n of Machinists & Aerospace Workers Pension Plan*, 750 F.2d 1458, 1465 (9th Cir. 1985) (noting discretion of court in awarding prejudgment interest under ERISA). For a summary of recent case law developments in the area of prejudgment interest under ERISA, see generally Terese M. Connerton, *Suits By Beneficiaries Against Plans or Employers to Recover Benefits*, SB68 ALI-ABA 569, 636-37 (Jan. 23, 1997) [hereinafter Connerton, *Suits By Beneficiaries*]; Terese M. Connerton, *Suits By Beneficiaries Against Plans or Employers to Recover Benefits*, CA23 ALI-ABA 207, 270-71 (Feb. 1, 1996) [hereinafter Connerton, *Suits By Beneficiaries Against Plans*]; Roger C. Siske et al., *What's New in Employee Benefits: A Summary of Current Case and Other Developments*, SC17 ALI-ABA 1, 138-39 (Oct. 16, 1997). For an introduction to the definition of and issues involved in calculating prejudgment interest, see generally John C. Keir & Robin C. Keir, *Opportunity Cost: A Measure of Prejudgment Interest*, 39 BUS. LAW. 129 (1983); Knoll, *supra* note 1, at 293; R.F. Lanzillotti & A.K. Esquibel, *Measuring Damages in Commercial Litigation: Present Value of Lost Opportunities*, 5 J. ACCT. AUDITING & FIN. 125 (1990); James M. Patell et al., *Accumulating Damages in Litigation: The Roles of Uncertainty and Interest Rates*, 11 J. LEGAL STUD. 341 (1982).

9. See *Fotta*, 165 F.3d at 214 (creating presumptive right to interest for any delayed payments under ERISA plan). Tangential litigation may, in some cases, occur to substantively establish a right to funds under ERISA. See, e.g., *id.* (noting Pennsylvania Supreme Court decision upholding right to receive worker's com-

action has the potential to enhance a client's recovery or liability, thus practitioners should follow its development.¹⁰

This Casebrief explains the Third Circuit's approach to awarding interest under ERISA, focusing on the watershed development in *Fotta v. Trustees of the United Mine Workers*,¹¹ in which the court created a cause of action for interest on delayed payments under ERISA-governed plans.¹² Part II discusses the purpose of interest, highlights ERISA's approach to awarding interest and chronicles the Third Circuit's and other circuits' approaches to awarding prejudgment interest.¹³ Part III explains the Third Circuit's creation of an entitlement to interest under ERISA for delays in payment of ERISA-governed funds.¹⁴ Part IV highlights several results and unanswered questions after *Fotta*.¹⁵

pensation benefits). The litigation, however, that is lacking, is direct litigation under ERISA to establish entitlement to funds. See *id.* at 212 (noting difference between interest on delayed payments and prejudgment interest).

10. See, e.g., *Anthuis*, 971 F.2d at 1001 (awarding \$15,245.00 severance pay and \$13,570.78 prejudgment interest). As a further illustration of large prejudgment interest awards, see *American Bell Int'l, Inc. v. Islamic Republic of Iran*, 12 Iran-U.S. Cl. Trib. Rep. 170, 229-31 (1986) (awarding approximately \$28 million in interest in international context); *Kuwait v. Aminoil* (Final Award of Mar. 24, 1982), reprinted in 21 I.L.M. 976, 1042 (1982) (awarding \$83 million in damages and \$96 million in interest).

Despite the practical effect of interest awards increasing claim recovery, most courts treat the issue perfunctorily. See *Keir & Keir*, *supra* note 8, at 131-32 (stating that most courts ignore prejudgment interest). One court poignantly summarized, over 100 years ago, the treatment of interest by courts:

The question of interest is one much more often passed upon than carefully considered by the courts. It is usually presented only incidentally to much more important issues, and often decided one way or the other at the close of exhaustive investigation of the other questions, and with the perhaps unconscious feeling that it is not of sufficient magnitude to justify further serious labor.

Laycock v. Parker, 79 N.W. 327, 332 (Wis. 1899). One commentator noted that "th[e]se words could have been written today." Knoll, *supra* note 1, at 301 n.47 (citing to *Nelson v. Travelers Ins. Co.*, 306 N.W.2d 71, 75 (Wis. 1981), statement, "With some exceptions, these observations could be made with equal pertinence today . . .").

11. 165 F.3d 209 (3d. Cir. 1998).

12. See *id.* (creating cause of action). For a further discussion of the Third Circuit's creation of a cause of action for interest on delayed payments under ERISA, see *infra* notes 105-32 and accompanying text.

13. For a further discussion of interest and several circuits' approaches to the awarding of prejudgment interest, see *infra* notes 16-29, 43-78 and accompanying text.

14. For a further discussion of the Third Circuit's holding in *Fotta*, see *infra* notes 95-132 and accompanying text.

15. For a further discussion of the result of *Fotta* and unanswered questions after the *Fotta* decision, see *infra* notes 133-65 and accompanying text.

II. OVERVIEW OF THE AWARDING OF INTEREST UNDER ERISA

A. Interest Basics

1. Interest Generally

Interest is a sum paid to compensate for the temporary withholding of money and the loss of its use by the party entitled to it.¹⁶ When awarded, a claimant need not generally prove actual loss.¹⁷ Damages are

16. See DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.6(1), at 333 (2d ed. 1993) (defining interest). The concept of interest dates to Roman Law. See *Library of Congress v. Shaw*, 478 U.S. 310, 315 n.2 (1986) (citing WILLIAM J. ASHLEY, AN INTRODUCTION TO ENGLISH ECONOMIC HISTORY AND THEORY 196 (1966); LEADAM, INTEREST AND USURY, in PALGRAVE'S DICTIONARY OF POLITICAL ECONOMY 432 (Henry Higgins ed., 1925)).

Several common law restraints on interest have developed over the years. The traditional rule is that prejudgment interest is not compounded annually. See Knoll, *supra* note 1, at 306; see also Peter C. Canellos & Edward D. Kleinbard, *The Miracle of Compound Interest: Interest Deferral and Discount After 1982*, 38 TAX. L. REV. 565, 566 (1983) ("Financial accounting generally follows the compound interest model."); Knoll, *supra*, at 306-08 (explaining, with formulas, differences between simple and compound interest); Lawrence Lokken, *The Time Value of Money Rules*, 42 TAX. L. REV. 1, 11-14 (1986) (discussing interest); Patrick J. McDivitt, Comment, *Pre-Judgment Interest as an Element of Damages: Proposed Solutions for a Colorado Problem*, 49 U. COLO. L. REV. 335, 342-43 (1978) (discussing aspects of compounding interest); Anthony E. Rothschild, Comment, *Prejudgment Interest: Survey and Suggestion*, 77 NW. U. L. REV. 192, 218 (1982) (same). With simple interest, the interest is calculated each year on the original base amount. See Knoll, *supra*, at 306. In contrast, with compounded interest, the interest from the previous period is added to the base amount, and interest then accrues on this new amount. See *id.* Compound interest, thus, produces a larger amount. See *id.*

Despite the common law rule, some state statutes have liberalized interest, permitting compound interest to accrue. See *id.* at 306-07 (noting variations on common law rule); see also *Big Bear Properties, Inc. v. Gherman*, 157 Cal. Rptr. 443, 446-47 (Ct. App. 1979) (noting general rule that interest may not be compounded unless statutory provisions provide otherwise or parties agree). When state statutes are silent, the majority rule appears to be that simple interest is awarded. See Knoll, *supra* note 1, at 307 (noting majority rule and arguing that compound interest is more appropriate). Under federal law, the decision whether to award simple or compound interest is left to the discretion of the court. See *id.*; see also *Bio-Rad Labs., Inc. v. Nicolet Instrument Corp.*, 807 F.2d 964, 969 (Fed. Cir. 1986) (noting district court's discretion to award simple or compound interest).

In addition to the simple/compound debate, there exist limits developed in the common law regarding the types of claims that may recover interest. See Knoll, *supra* note 1, at 351 ("As the law is currently enforced, not all awards generate prejudgment interest."). The common law rule is that interest is not generally recoverable on unliquidated claims such as personal injury awards, punitive damages, claims not ascertainable by a fixed dollar amount and nonpecuniary losses, such as pain and suffering. See *id.*; see also 1 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 3.6(4), at 356 (3d ed. 1993) (noting general rule that most jurisdictions do not assess prejudgment interest on punitive damages).

17. See GOTANDA, *supra* note 6, at 14 (noting lack of necessity to prove actual damage for interest claims).

normally presumed because the delay in payment deprives the claimant of the opportunity to invest the money owed to him or her.¹⁸

2. *Prejudgment Interest*

Prejudgment or compensatory interest is interest included as part of an award.¹⁹ In contrast, post-judgment interest is interest that accrues on an award.²⁰ The rationale for awarding prejudgment interest to a success-

18. See *id.* (stating rationale for lack of necessity of proof of actual damage to receive interest). The United States Supreme Court explained this rationale: "Every one who contracts to pay money on a certain day knows that, if he fails to fulfil his contract, he must pay the established rate of interest as damages for his non-performance. Hence, it may correctly be said that such is the implied contract of the parties." *Spalding v. Mason*, 161 U.S. 375, 396 (1896) (quoting *Curtis v. Innerarity*, 47 U.S. (6 How.) 146, 154 (1848)); see *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163, 168 (1933) (stating that plaintiff is "not fully compensated if he is confined to the amount found to be recoverable as of the time of the breach" with no added compensation for delay in payment); *Proctor & Gamble Distrib. Co. v. Sherman*, 2 F. Supp. 165, 166 (S.D.N.Y. 1924) ("Whatever may have been our archaic notions about interest, in modern financial communities . . . [t]he present use of my money is itself a thing of value and, if I get no compensation for its loss, my remedy does not altogether right my wrong."); Knoll, *supra* note 1, at 296 ("Because excess funds can be lent at interest and funds can be borrowed only by paying interest, unless interest is assessed on the original judgment the successful plaintiff is not fully compensated and the losing defendant is unjustly enriched.").

19. See GOTANDA, *supra* note 6, at 13 (defining interest). No universal rule governs the awarding of prejudgment interest. See Knoll, *supra* note 1, at 297 (noting that prejudgment interest awards are "far from universal"). Courts take one of three approaches regarding prejudgment interest. See Note, *Developments in the Law: Damages—1935-47*, 61 HARV. L. REV. 113, 136 (1947) (noting three historic approaches). Some United States jurisdictions bar recovery. See Rothschild, *supra* note 16, at 200 (stating that Illinois state courts award prejudgment interest only when expressly provided by contract or in one of limited situations expressly listed in state statute). Several courts and statutes allow courts, at their discretion, to award prejudgment interest. See *id.* at 204 (noting discretion). This approach represents the practice used by the several courts of appeals. See, e.g., *Fotta v. Trustees of the United Mine Workers*, 165 F.3d at 209, 212 (3d Cir. 1998) (discussing precedent within Third Circuit giving courts discretion to award prejudgment interest). Other courts expressly recognize a successful plaintiff's entitlement to prejudgment interest. See Rothschild, *supra* note 16, at 209 (noting absolute right to recover interest).

The reluctance of some legislatures and courts to award prejudgment interest is rooted in "an ancient hostility towards interest." Knoll, *supra* note 1, at 298; see Keir & Keir, *supra* note 8, at 131 (stating that "ancient and medieval prejudices against the charging of interest" affect current attitudes toward awarding it). Past attitudes toward interest were hostile because interest was viewed as a means of punishing a defendant rather than compensating a plaintiff. See Knoll, *supra* note 1, at 298. This view, however, has waned, and "the trend is toward awarding prejudgment interest on all monetary awards." Knoll, *supra*, at 299; see Patrick C. Diamond, Note, *The Minnesota Prejudgment Interest Amendment: An Analysis of the Offer-Counteroffer Provision*, 69 MINN. L. REV. 1401, 1401 (1985) (noting trend). For an historical overview of prejudgment interest, see Martin Oyes, Note, *Prejudgment Interest in South Dakota*, 33 S.D. L. REV. 484, 485-88 (1988).

20. See GOTANDA, *supra* note 6, at 56 (defining post-judgment interest). This Casebrief does not focus on the awarding of post-judgment interest under ERISA; it will be discussed occasionally to provide a contrast with the awarding of prejudg-

ment interest. As a general rule, however, courts do award post-judgment interest in ERISA cases. See, e.g., *Smith v. American Int'l Life Assurance Co. of N.Y.*, 50 F.3d 956, 957 (11th Cir. 1995) (awarding post-judgment interest at federal rate).

In contrast to prejudgment interest, post-judgment interest is exclusively a statutory creation. See Knoll, *supra* note 1, at 359 (noting pedigree of post-judgment interest). Whether post-judgment interest is awarded "can be financially significant because the period between the date of the award and payment can be lengthy, especially when a suit is required to enforce the award." GOTANDA, *supra* note 6, at 56. Post-judgment interest serves three purposes. See *id.* at 58. First, similar to prejudgment interest, it compensates the successful party for the loss of the use of money between the rendering of the judgment and payment. See *id.* Second, it "creates an incentive for the unsuccessful party to avoid frivolous appeals." *Id.* Third, it "encourages parties to promptly pay the damages, and thus eliminates judicial proceedings to enforce the award." *Id.*

Unlike prejudgment interest, a federal statute exists governing the availability of and rate of post-judgment interest in federal courts. See 28 U.S.C. § 1961 (1994). Section 1961 provides:

- (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment
- (b) Interest shall be computed daily to the date of payment . . . and shall be compounded annually.

Id.

All states also have statutes providing for the awarding of post-judgment interest. See Brian P. Miller, Comment, *Statutory Post-Judgment Interest: The Effect of Legislative Changes After Judgment and Suggestions for Construction*, 1994 B.Y.U. L. REV. 601, 618-31 (1994) (listing each state's statute). The method of setting the rate, however, varies from state to state. See GOTANDA, *supra* note 6, at 68 (noting three methods to set rate).

Some statutes fix the rate of interest at a specified rate. See ALA. CODE § 8-8-10 (1993) (12%); ARIZ. REV. STAT. ANN. § 44-1201 (1994) (10%); ARK. CODE ANN. § 16-65-114 (Michie 1987) (same); CAL. CIV. PROC. CODE § 685.010 (West 1987) (same); CONN. GEN. STAT. § 37-39 (Supp. 1994) (same); GA. CODE ANN. § 7-4-12 (1989) (12%); HAW. REV. STAT. § 478-3 (Supp. 1992) (10%); ILL. COMP. STAT. CH. ANN. Ch. 735, para. 5/2-1303 (West 1992) (9% or 6% "if judgment debtor is a unit of local government"); IND. CODE ANN. § 24-4.6-1-101 (Michie Supp. 1994) (8%); IOWA CODE ANN. § 535.3 (West Supp. 1994) (10%); KY. REV. STAT. ANN. § 360.040 (Michie 1987) (12%); ME. REV. STAT. ANN. tit. 14, § 1602-A (West Supp. 1993) (15% if in district court; otherwise, treasury bill rate plus 7%); MD. CODE ANN., CTS. & JUD. PROC. § 11-107 (1989) (10%); MASS. GEN. LAWS ANN. ch. 235, § 8 (West 1986) (awarding interest at same rate "as provided for prejudgment interest in such award, report, verdict, or finding"); MO. ANN. STAT. § 408.040 (West 1990) (9%); PA. STAT. ANN. tit. 42, § 8101 (West 1996) (6%); S.C. CODE ANN. § 34-31-20(B) (Law. Co-op. 1987) (14%); S.D. CODIFIED LAWS §§ 54-3-5.1 (Michie 1990) (stating that "[i]nterest is payable on all judgments . . . at the Category B rate of interest . . . in § 54-3-16", 54-3-16(2) (Supp. 1994) (10%); TENN. CODE ANN. § 47-14-121 (1988) (same); VT. STAT. ANN. tit. 12, § 2903 (Supp. 1993) (awarding 12%); VT. CODE ANN. tit. 5, § 426 (Supp. 1994) (9%); VA. CODE ANN. § 6.1-330.54 (Michie 1993) (same); WASH. REV. CODE § 4.56.110 (Supp. 1994) (12% or yield of 26-week treasury bill plus 4%, whichever is greater); W. VA. CODE § 56-6-31 (Supp. 1994) (10%); WIS. STAT. ANN. § 815.05(8) (West 1994) (12%); WYO. STAT. ANN. § 1-16-102 (Michie Supp. 1994) (10%).

ful plaintiff is two-fold.²¹ First, prejudgment interest promotes fairness by fully compensating a party for losses incurred by the delayed payment.²² The payment of prejudgment interest ensures that the successful party re-

In other states, the rate of interest is tied to an index or market rate. *See* D.C. CODE ANN. §§ 28-3302 (1981) (stating that rate "on judgments . . . against the District of Columbia, or its officers" is 4%, and in all other cases the rate is "70% of the rate of interest set by the Secretary of the Treasury pursuant to section 6621 of the Internal Revenue Code of 1986"), 15-109 (stating that in breach of contract cases, judgment "shall allow interest on the amount . . . from the date of the judgment only"); FLA. STAT. ANN. § 55.03 (West 1994) (stating that rate shall be established by "averaging the discount rate of the Federal Reserve Bank of New York for the preceding year, then adding 500 basis points to the averaged federal discount rate"); MINN. STAT. ANN. § 549.09 (West Supp. 1994) (stating that rate "shall be based on the secondary market yield of one year United States treasury bills" for most recent calendar month); N.J. CT. R. 4:42-11 (stating that rate is based on state fund).

Some states set interest rates by combining a fixed percentage with another rate. *See* ALASKA STAT. § 09.30.070 (Michie 1983) (3% plus Twelfth Federal Reserve District discount rate in effect on January 2 of year in which judgment is entered); COLO. REV. STAT. § 13-21-101 (1987) (discount rate plus 2%); DEL. CODE ANN. tit. 6, § 2301 (1993) (federal reserve discount rate plus 5%); IDAHO CODE § 28-22-104 (1993) (5% plus weekly average yield of treasury securities as adjusted to constant maturity of one year); KAN. STAT. ANN. § 16-204 (1988) (discount rate plus 4%, depending on year of judgment); MICH. COMP. LAWS § 600.6455 (1987) (1% plus five-year treasury notes rate); NEV. REV. STAT. ANN. § 17.130 (Michie 1993) (2% plus prime rate at largest bank in Nevada); N.H. REV. STAT. ANN. § 336:1 (1984) (2% plus prevailing discount rate of interest on 52-week United States treasury bills at last auction thereof preceding last day of September in each year); OKLA. STAT. tit. 12, § 727 (1988) (4% plus treasury bill rate at first of year); UTAH CODE ANN. § 15-1-4 (Supp. 1994) (28 U.S.C. § 1961 rate plus 2%).

Still other states allow courts to exercise discretion in setting the rate of interest. *See* MISS. CODE ANN. § 75-17-7 (1972) (providing that "judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair"); N.J. CT. R. 4:42-11 (providing interest rates on judgments are established by Supreme Court of New Jersey and then set forth in New Jersey court rules).

21. *See* Knoll, *supra* note 1, at 295 ("Prejudgment interest plays an important role in promoting fairness and efficiency."). Several commentators have argued against awarding prejudgment interest because, they suggest, it discourages settlement. *See, e.g.,* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 558-59 (4th ed. 1992) (arguing that prejudgment interest discourages settlement by increasing stakes); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 535-36 (1994) (arguing that parties are less likely to cooperate as difference between market interest rate and prejudgment interest rate increases); George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 539 (1989) (proposing that prejudgment interest discourages settlement by significantly increasing settlement cost); Geoffrey P. Miller, Comment, *Some Thoughts on the Equilibrium Hypothesis*, 69 B.U. L. REV. 561, 567 (1989) (proposing that prejudgment interest both discourages settlement by increasing stakes and encourages settlement by reducing defendant's incentive to delay). *But see* HANS ZEISEL ET AL., *DELAY IN THE COURT* 133-36 (1959) (arguing that prejudgment interest does not discourage settlement).

22. *See* Knoll, *supra* note 1, at 295 (noting that fairness requires interest to be awarded to compensate party fully).

ceives full compensation and that the defendant pays the entire penalty.²³ Second, prejudgment interest promotes efficiency in two ways.²⁴ Because prejudgment interest fully compensates, it provides future litigants with an added incentive to take precautions when engaging in the activity that produced the judgment.²⁵ In addition, prejudgment interest deters delays in litigation.²⁶ Claims for prejudgment interest generally raise three issues: (1) whether interest may be awarded; (2) if it may be awarded, for what period of time it accrues; and (3) at what rate the interest is to be awarded.²⁷

3. "Interest on Delayed Payments" Under ERISA

Similar to prejudgment interest, interest on delayed payments serves to compensate the prevailing party and to prevent unjust enrichment to the losing party.²⁸ In contrast to prejudgment interest, which results when

23. See *id.* at 296 (stating that interest "put[s] both parties in the same position that they would have been in if the judgment had been paid immediately"); see also *In re Pago Pago Aircrash* of Jan. 30, 1974, 525 F. Supp. 1007, 1014 (C.D. Cal. 1981) ("An individual who must litigate to recover damages should be placed in the same position, when he recovers, as the individual who recovered the day he suffered an injury."); H. Deane Wong, Comment, *Prejudgment Interest: Too Little, Too Much, or Both?*, 10 ALASKA L. REV. 219, 221-23 (1981) (listing rationales for awarding prejudgment interest as compensation for plaintiff's loss and prevention of defendant's unjust enrichment).

24. See Knoll, *supra* note 1, at 296 (stating that second rationale for interest is efficiency).

25. See *id.* (stating that, without prejudgment interest, "prospective defendants will be undeterred and will take too few precautions, whereas prospective plaintiffs will be overdeterred and will take excessive precautions"); see also POSNER, *supra* note 21, at 163-65 (arguing that tort system ensures efficient levels of precautionary measures); cf. James A. Henderson, Jr., *Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality*, 58 N.Y.U. L. REV. 765, 775-76 (1983) (arguing that failure to grant prejudgment interest discourages manufacturers from modifying defective products).

26. See Knoll, *supra* note 1, at 297 (arguing that, without prejudgment interest, defendants have incentive to "stretch out litigation"); see also POSNER, *supra* note 21, at 564-66 (discussing equilibrium with respect to amounts opposing parties spend on litigation); *Recent Developments—Prejudgment Interest as Damages: New Application of an Old Theory*, 15 STAN. L. REV. 107, 111 (1962) (arguing to use prejudgment interest to "discourage defendant's use of 'the law's delay' as an instrument of coercion"); Rothschild, *supra* note 16, at 209 (noting several jurisdictions' use of prejudgment interest). Professor Knoll provides an economic analysis for this conclusion. See Knoll, *supra* note 1, at 297. Delaying judgment "provide[s] the defendant with an interest free loan from the plaintiff until the judgment is rendered." *Id.* As a result, the defendant benefits at the plaintiff's expense by prolonging litigation because the defendant could not otherwise borrow money without paying interest. See *id.* Knoll argues that setting interest at a market rate will negate either party being helped or hindered in this respect. See *id.*

27. See GOTANDA, *supra* note 6, at 11-12 (framing three issues). For a thorough survey of national laws and international arbitral tribunal approaches to the awarding of prejudgment interest, see generally *id.* at 11-55.

28. Compare *Fotta v. Trustees of the United Mine Workers*, 165 F.3d 209, 212 (3d Cir. 1998) (noting that making plaintiff whole and preventing unjust enrich-

a court awards interest as part of an underlying judgment, interest on delayed payments may accrue, absent an underlying judgment on the merits, in a separate cause of action seeking interest.²⁹

B. *ERISA and the Awarding of Prejudgment Interest*

1. *ERISA's Silence*

One of Congress' purposes for enacting ERISA was to "provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts" to deal with breaches of ERISA or to mandate its enforcement.³⁰ Courts traditionally award interest to remedy breaches of monetary obligations.³¹ ERISA, however, does not grant courts a general power to award interest.³² In contrast, ERISA does contain an express provision for prejudgment interest awards in lawsuits to recover delinquent employer contributions to a multi-employer plan.³³ Additionally, ERISA contains a general power permitting courts to award "other appropriate equitable relief" to redress violations of ERISA or to enforce any ERISA provisions.³⁴ The legislative history is unclear as to the remedies Congress intended under this provision.³⁵

ment are policy justifications for awarding interest on delayed payments), *with* Knoll, *supra* note 1, at 296 (noting compensation to plaintiff and prevention of unjust enrichment of defendant as policies undergirding award of prejudgment interest).

29. See *Fotta*, 165 F.3d at 214 (establishing independent cause of action to recover interest on delayed payments under ERISA-governed pension plans).

30. 29 U.S.C. § 1001(b) (1994).

31. See, e.g., Knoll, *supra* note 1, at 299 (noting trend to award prejudgment interest on all monetary awards).

32. See generally 29 U.S.C. §§ 1001-1461 (1994) (failing to create general power to award prejudgment interest); Haic, *supra* note 6, at § 68.14 (noting ERISA's silence on prejudgment interest awards).

33. See 29 U.S.C. §§ 1145, 1132(g)(2) (1994) (creating power to award prejudgment interest in defined class of lawsuits).

34. See 29 U.S.C. § 1132(a)(3)(B) (1994) (creating cause of action to obtain "other appropriate equitable relief"). Section 1132(a)(3) provides:

(a) Persons empowered to bring a civil action

A civil action may be brought—

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan

Id. Section 1132(a)(5) provides the Secretary of Labor with a similar cause of action to obtain "other appropriate equitable relief." *Id.* § 1132(a)(5). For the other causes of action available under ERISA, see generally § 1132.

35. See Eduard A. Lopez, *Equitable Remedies for Breach of Fiduciary Duty Under ERISA After Varity Corp. v. Howe*, 18 BERKELEY J. EMP. & LAB. L. 323, 345 (1996) ("The legislative history does not indicate which particular remedies Congress intended to provide for in section [1132(a)(3)]."); see also S.4, 93d Cong., 1st Sess., § 603 (1973), reprinted in 1 LEGIS. HIST. 183, 579. The Senate bill provided for "appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation or duty of a fiduciary." *Id.* The House bill authorized the

2. Supreme Court Guidance

The Supreme Court of the United States has never directly addressed whether interest may be awarded as "other appropriate equitable relief" under ERISA.³⁶ The absence of express mention of interest availability in statutes, however, has not been interpreted by the Supreme Court as manifesting an unequivocal congressional purpose to prohibit interest awards.³⁷ In addition, the Supreme Court has determined that Congress intended federal courts to develop a "federal common law of rights and obligations under ERISA-regulated plans" to be used in applying ERISA.³⁸

Secretary of Labor to sue "to enjoin any act or practice which appears to him to violate any provision of this title." H.R. 2, 93d Cong., 1st Sess., § 106 (1973), *reprinted in* 1 LEGIS. HIST. at 33.

36. See 29 U.S.C. § 1132(a)(3)(B) (creating cause of action to obtain "other appropriate equitable relief"). For a thorough introduction to Supreme Court cases construing and applying ERISA, see generally Andrew M. Campbell, *Construction and Application of Employee Retirement Income Security Act of 1974* (29 U.S.C.A. §§ 1001 *et. seq.*) by United States Supreme Court, 150 A.L.R. FED. 441 (1998).

37. See *Billings v. United States*, 232 U.S. 261, 284-88 (holding that statutory silence does not bar interest recovery), *aff'd as modified*, 232 U.S. 289 (1914). A unanimous Supreme Court recently reiterated this theme:

Although Congress has enacted a statute governing the award of postjudgment interest in federal court litigation, see 28 U.S.C. § 1961, there is no comparable legislation regarding prejudgment interest. Far from indicating a legislative determination that prejudgment interest should not be awarded, however, the absence of a statute merely indicates that the question is governed by traditional judge-made principles.

City of Milwaukee v. Cement Div., Nat'l Gypsum Co., 515 U.S. 189, 194 (1995).

38. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987); see *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (noting power of courts to create federal common law for ERISA); 120 CONG. REC. S29942 (daily ed. Aug. 22, 1974) (statement of Sen. Javits) ("It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans."); William K. Carr & Robert L. Liebross, *Wrongs Without Rights: The Need for a Strong Federal Common Law of ERISA*, 1993 STAN. L. & POL'Y REV. 221, 224-25 (arguing that Congress delegated to courts job to create federal common law to fill gaps not addressed by ERISA); Jayne E. Zanglein, *Closing the Gap: Safeguarding Participants' Rights By Expanding the Federal Common Law of ERISA*, 72 WASH. U. L.Q. 671, 678-79 (1994) (arguing that Congress intended vast federal common law to be developed under ERISA). *But see* *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259 (1993) (cautioning that authority of courts to develop common law under ERISA is not equivalent to authority to revise text of statute); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An 'Institutionalist' Perspective*, 83 NW. U. L. REV. 761, 768-69 (1989) (arguing that creation of federal common law represents illegitimate exercise of policymaking powers delegated to Congress).

In the area of remedies, 29 U.S.C. § 1132(a) identifies several possible civil actions. See § 1132(a). Although detailed, the section does not exhaust every remedy Congress could have created; nor does it include all the remedies that formerly existed under ERISA-preempted state law. See Jeffrey A. Brauch, *The Federal Common Law of ERISA*, 21 HARV. J.L. & PUB. POL'Y 541, 548 (1998) (noting that Congress could have codified more remedies). Dissatisfaction with the limited number of remedies and preemption of state law remedies "has given impetus to the creation of a broad federal common law under ERISA." *Id.* at 549.

Although the Supreme Court has not addressed the interest issue, the Court has addressed whether extracontractual damages, such as punitive damages, may be awarded under ERISA.³⁹ In *Massachusetts Mutual Life Insurance Co. v. Russell*,⁴⁰ the Supreme Court held that extracontractual damages are not available under one ERISA remedy provision.⁴¹ Although the Court expressly reserved the question whether extracontractual damages may be available under the provision providing for “other appropriate equitable relief,” several circuits have extended the *Russell* decision to prevent recovery under this provision.⁴²

C. *Development of Prejudgment Interest Awards in the Circuits*

All circuits agree that federal district courts may award prejudgment interest under ERISA to compensate the plaintiff for delays in benefits owed under ERISA-governed pension plans when litigation ensues to obtain benefits.⁴³ Within the several circuits, however, courts use various approaches for determining the accrual period.⁴⁴ In addition, within the circuits, there exists several means to determine the applicable prejudgment interest rate.⁴⁵

1. *Interest Award Availability*

The Third Circuit’s approach to the availability of prejudgment interest conforms with the practice in the other circuits; all courts agree that federal district courts may exercise discretion to award prejudgment interest under ERISA.⁴⁶

39. See *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) (holding that extracontractual damages are not available under ERISA).

40. 473 U.S. 134 (1985).

41. See *id.* at 148 (holding that under § 1109(a) of ERISA, extracontractual damages are not available).

42. See *id.* (reserving question of extracontractual recovery under 29 U.S.C. § 1132 (a) (3)); *International Union UAW Local 91 v. Park-Ohio Indus., Inc.*, 876 F.2d 894, 897 (6th Cir. 1989) (dismissing claim for extracontractual damages under § 1132(a) (3)); *Johnson v. District 2, Marine Eng’s Beneficial Assoc.-Associated Maritime Officers, Med. Plan*, 857 F.2d 514, 518 (9th Cir. 1988) (same).

43. For a discussion of interest availability under ERISA, see *infra* notes 46-58 and accompanying text.

44. For a discussion of the three ways courts tend to set accrual dates, see *infra* notes 59-65 and accompanying text.

45. For a discussion of the circuit split on accrual and interest rate, see *infra* notes 66-78 and accompanying text.

46. See, e.g., *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 223 (1st Cir. 1996) (upholding availability of prejudgment interest under ERISA); *Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1330 (8th Cir. 1995) (holding prejudgment interest is “other appropriate equitable relief” under ERISA); *Nelson v. EG & G Energy Measurements Group, Inc.*, 37 F.3d 1384, 1391 (9th Cir. 1994) (same); *Lutheran Med. Ctr. v. Contractors, Laborers, Teamsters & Eng’s Health & Welfare Plan*, 25 F.3d 616, 623 (8th Cir. 1994) (same); *Quesinberry v. Life Ins. Co.*, 987 F.2d 1017, 1033 (4th Cir. 1993) (same); *Diduck v. Kaszycki & Sons Contractors Inc.*, 974 F.2d 270, 286 (2d Cir. 1992) (“[A] court has wide discretion . . . to award

In *Schake v. Colt Industries Operating Corp. Severance Plan for Salaried Employees*,⁴⁷ the Third Circuit explicitly recognized the power of its courts to award prejudgment interest under ERISA, despite the lack of an express congressional mandate.⁴⁸ The Third Circuit expanded this holding in *Anthuis v. Colt Industries Operating Corp.*,⁴⁹ rejecting a statutory construction argument aimed at disavowing a court's power under ERISA to award prejudgment interest.⁵⁰

In *Anthuis*, the pension fund argued that three facts counseled against construing ERISA to contain a general power to award prejudgment interest.⁵¹ The pension fund argued that Congress failed to specify that interest may be generally awarded, that Congress expressly enumerated instances in which interest is available under ERISA and that Congress expressly provided that attorneys' fees and costs are available, but was silent as to the availability of interest under ERISA.⁵²

prejudgment interest."); *Drennan v. General Motors Corp.*, 977 F.2d 246, 253 (6th Cir. 1992) (same); *Lorenzen v. Employees Retirement Plan of the Sperry & Hutchinson Co.*, 896 F.2d 228, 236 (7th Cir. 1990) (noting that prejudgment interest is necessary under ERISA to compensate); *Ziaee v. Vest*, 916 F.2d 1204, 1208 (7th Cir. 1990) (stating that "[p]rejudgment interest compensates the prevailing party for the loss of use of money during the time between the wrong and the conclusion of the litigation"); *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751-52 (8th Cir. 1986) (recognizing availability of prejudgment interest); *Shaw v. International Ass'n of Machinists & Aerospace Workers Pension Plan*, 750 F.2d 1458, 1465 (9th Cir. 1985) (noting discretion to award prejudgment interest).

47. 960 F.2d 1187 (3d Cir. 1992).

48. *See id.* at 1192 n.4 (noting power to award prejudgment interest); *see also Anthuis v. Colt Indus. Operating Corp.*, 971 F.2d 999, 1010 (3d Cir. 1992) (same). In *Anthuis*, the court "regard[ed] *Schake* as providing authority for the principle from which we may not depart that in the district court's discretion, prejudgment interest may be awarded for a denial of pension benefits." *Anthuis*, 971 F.2d at 1010.

Prior to the Court of Appeals recognition, several district courts within the Third Circuit had been awarding interest under ERISA. *See, e.g., Kay v. Thrift & Profit Sharing Plan for Employees of Boyertown Casket Co.*, 780 F. Supp. 1447, 1462 (E.D. Pa. 1991) (awarding interest for delayed payments under ERISA); *Pierce v. American Waterworks Co.*, 683 F. Supp. 996, 1001 (W.D. Pa. 1988) (same); *Kann v. Keystone Resources, Inc.*, 575 F. Supp. 1084, 1095-96 (W.D. Pa. 1983) (same).

49. 971 F.2d 999 (3d Cir. 1992).

50. *See id.* at 1008-09 (discussing whether Congress' delineation of prejudgment interest availability in limited ERISA areas preempts finding general power under ERISA to award prejudgment interest).

51. *See id.* at 1008-10 (noting arguments).

52. *See* 29 U.S.C. § 1132(g)(2)(B) (1994); *see also Anthuis*, 971 F.2d at 1009 (citing plan administrator's arguments). The plan administrator noted that the structure of 29 U.S.C. § 1132(g) provides:

(1) In any action under this subchapter . . . the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary . . . to enforce section 1145 [delinquent contributions] . . . the court shall award the plan . . .

(B) interest on the unpaid contributions

29 U.S.C. § 1132(g) (1994).

To uphold the power to award prejudgment interest despite the congressional silence and structure of ERISA, the Third Circuit resorted to its general practice that “[i]n the absence of an explicit congressional directive, the awarding of prejudgment interest under federal law is committed to the trial court’s discretion.”⁵³ In *Schake* and *Anthuis*, the Third Circuit adopted a compensatory view of prejudgment interest—its award remedies the loss of the use of one’s money.⁵⁴ This compensatory purpose aims to

Because section 1132(g) provides only that attorneys’ fees and costs be awarded, it follows, the defendant argued, that interest is available only when specified. See *Anthuis*, 971 F.2d at 1009. Although the court did not specifically address this argument, it can be rebutted by labeling the types of relief sought. If interest is deemed to be implicit in the making of a contract, there is no need to delineate its recovery. See *Spalding v. Mason*, 161 U.S. 375, 396 (1896) (“Every one who contracts to pay money on a certain day knows that, if he fails to fulfil his contract, he must pay the established rate of interest as damages for his non-performance. Hence, it may correctly be said that such is the implied contract of the parties.”). On the other hand, if attorneys’ fees and costs are deemed to be extracontractual, it seems reasonable that Congress would specifically define in the statute that recovery is possible. See GOTANDA, *supra* note 6, at 142-46 (stating attorneys’ fees and costs are not implied in contract).

53. *Ambromovage v. United Mine Workers*, 726 F.2d 972, 981-82 (3d Cir. 1984); see *Board of Comm’rs of Jackson County, Kansas v. United States*, 308 U.S. 343, 352 (1939) (articulating general practice in federal courts that prejudgment interest is “given in response to considerations of fairness [and] denied when its exaction would be inequitable”); *Hardtke v. Exide Corp.*, 821 F. Supp. 1021, 1031 (E.D. Pa. 1993) (noting broad discretion to award prejudgment interest).

54. See *Schake v. Colt Indus. Operating Corp.*, 960 F.2d 1187, 1192 n.4 (3d Cir. 1992) (“It is undisputed that prejudgment interest typically is granted to make a plaintiff whole because the defendant may wrongly benefit from use of plaintiff’s money.”); *Anthuis*, 971 F.2d at 1009 (stating “prejudgment interest is to be ‘given in response to considerations of fairness [and] denied when its exaction would be inequitable’” (quoting *Board of Comm’rs of Jackson County, Kansas*, 308 U.S. at 352))).

Other circuits have also adopted this view. See, e.g., *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 752 (8th Cir. 1986) (adopting compensatory view of prejudgment interest); *Short v. Central States, Southeast & Southwest Areas Pension Fund*, 729 F.2d 567, 576 (8th Cir. 1984) (stating that prejudgment interest is appropriate where relief granted would fall short of making party “whole because he has been denied use of money which was his”).

The United States Court of Appeals for the Eighth Circuit articulated, and the Third Circuit cited with approval in *Anthuis*, 971 F.2d at 1010, the rationales for awarding prejudgment interest:

[P]rejudgment interest is to be awarded when . . . the relief granted would otherwise fall short of making the claimant whole because he or she has been denied the use of the money which was legally due. Awarding prejudgment interest is intended to serve at last [sic] two purposes: to compensate prevailing for the true costs of money damages incurred, and, where liability and the amount of damages are fairly certain, to promote settlement and deter attempts to benefit from the inherent delays of litigation. Thus prejudgment interest should ordinarily be granted unless exceptional or unusual circumstances exist making the award of interest inequitable.

Stroh Container Co., 783 F.2d at 752.

put the administering pension fund in the position it would have occupied absent a breach.⁵⁵

A court, however, need not award interest if the equities in the case counsel against it.⁵⁶ Moreover, interest availability is not indefinite.⁵⁷ The *Schake* court noted that post-judgment motions for discretionary awards of prejudgment interest under ERISA must be filed within ten days of judgment pursuant to jurisdictional constraints articulated by the Supreme Court in *Osterneck v. Ernst & Whinney*.⁵⁸

55. See *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir. 1984) (discussing re-turning pension to status quo rationale).

56. See, e.g., *Landwehr v. DuPree*, 72 F.3d 726, 739 (9th Cir. 1995) (affirming district court's denial of interest); *Hardtke* 821 F. Supp. at 1031 (noting that pre-judgment interest award should be granted on "'considerations of fairness [and] denied when its exaction would be inequitable.'" (quoting *Ambromovage*, 726 F.2d at 981-82); *Chacosky v. Hay Group*, No. CIV.A.89-8083, 1991 WL 12170, at *7 (E.D. Pa. Feb. 1, 1991) (declining to award prejudgment interest because delay in litigation was partly attributable to plaintiff).

Courts take several factors into account in deciding whether to award prejudgment interest in ERISA cases. See *Pension Benefit Guar. Corp. v. Greene*, 570 F. Supp. 1483, 1503-04 (W.D. Pa. 1983) (adopting factors used in non-ERISA cases in ERISA context), *aff'd*, 727 F.2d 1100 (3d Cir. 1983); see also *Nedd v. United Mine Workers*, 488 F. Supp. 1208, 1219-20 (M.D. Pa. 1980) (enumerating factors for courts to weigh in determining whether to award prejudgment interest), *aff'd sub nom. Ambromovage*, 726 F.2d 972; *Thomas v. Duralite Co.*, 524 F.2d 577, 589 (3d Cir. 1975) (noting considerations to be used in granting prejudgment interest); *Eazor Express, Inc. v. International Bhd. of Teamsters*, 520 F.2d 951, 973 (3d Cir. 1975) (same).

The four factors used in the Third Circuit include: (1) whether the claimant was not diligent in prosecuting the action; (2) whether the defendant was unjustly enriched; (3) whether the award would be compensatory in nature; and (4) whether countervailing equitable considerations mitigate against awarding prejudgment interest. See *Pension Benefit*, 570 F. Supp. at 1503. One commentator has summed up several courts' approaches by looking to the doctrine of laches: courts will deny interest to a plaintiff who unduly delayed in taking legal action. See Knoll, *supra* note 1, at 355 (noting courts' reliance on equitable doctrine of laches and criticizing its application because penalty varies directly with applicable rate of interest); see also *West Virginia v. United States*, 479 U.S. 305, 311 n.3 (1987) (stating that "an equitable consideration such as laches" could justify denial).

57. See *Schake*, 960 F.2d at 1192-93 (noting ten-day limit to request prejudgment interest after judgment).

58. 489 U.S. 169, 176 (1989). In *Schake*, the plan administrator appealed an adverse ruling by the Western District of Pennsylvania awarding the plaintiffs prejudgment interest, costs and attorney fees. See *id.* at 1189. One issue in the appeal involved whether the district court had jurisdiction to award prejudgment interest. See *id.* The court held that the district court did not have jurisdiction because an untimely motion was filed in the case. See *id.* Instead of filing within 10 days after the entry of the final judgment, counsel for plaintiffs filed a motion 97 days after the judgment requesting prejudgment interest. See *id.*

The Supreme Court articulated this jurisdictional constraint in *Osterneck*. See *Osterneck*, 489 U.S. at 175. The Court reasoned that because prejudgment interest is an element of complete compensation, it is integral to the merits of the judgment. See *id.* ("Thus, unlike attorney's fees . . . prejudgment interest traditionally has been considered part of the compensation due plaintiff."). As a result, any post-judgment motion for prejudgment interest must be filed within 10 days of the

2. *Period of Accrual*

Prejudgment interest generally accrues from a specified date until a judgment is rendered.⁵⁹ The Third Circuit has not adopted a starting date to be used in every prejudgment interest award under ERISA; instead, district courts exercise discretion when choosing an accrual date.⁶⁰ As a result, the district courts within the Third Circuit use various starting dates for accrual.⁶¹

Some district courts award interest from the date of breach, *i.e.*, the wrongful denial of benefits.⁶² Other district courts award interest from the time the pension fund receives notice of default.⁶³ Finally, some dis-

entry of the final judgment or the court will lose jurisdiction to award it. *See id.* at 173; *see also* FED. R. CIV. P. 59(e) (1998) ("Any motion to alter or amend a judgment shall be filed no later than 10 days after the entry of the judgment.").

59. *See* GOTANDA, *supra* note 6, at 22-23 (defining time of accrual).

60. For a discussion of the various methods employed by the district courts, *see infra* notes 62-65 and accompanying text.

61. Several commentators advocate different starting dates for accrual. *See, e.g.*, Michael K. Brown, *The Availability of Prejudgment Interest in Personal Injury and Wrongful Death Cases*, 16 U.S.F. L. REV. 325, 349-50 (1982) (arguing it is unfair to penalize defendant by accruing interest before claim is filed); Keir & Keir, *supra* note 8, at 137 ("A rule that would be more consistent with the law of damages would allow interest, as in the case of any other compensation, on the basis of the wrong done, not the course of litigation."); Don W. Cloud, Jr., Note, *Cavnar v. Quality Control Parking, Inc.: Prejudgment Interest is Now Recoverable in Personal Injury, Wrongful Death and Survival Action Cases*, 38 BAYLOR L. REV. 385, 409 (1986) (opining that assessing prejudgment interest from filing date is necessary to discourage plaintiffs from delaying filing); Oyes, *supra* note 19, at 507-08 (contending that accruing prejudgment interest from filing date will encourage hastily filed and poorly crafted pleadings); Thomas F. Londrigan & Lawrence R. Smith, *Prejudgment Interest: Is There Profit in Court Delay?*, JUDGES' J., Fall 1984, at 12, 44 (arguing that accruing prejudgment interest from filing date will result in unnecessary filings by those who have not yet assessed merits of their case but who do not want to delay accrual of interest); James D. Wilson, et. al., *Prejudgment Interest in Personal Injury, Wrongful Death, and Other Actions*, 30 TRIAL LAW GUIDE, 105, 116 (1986) (arguing that assessing interest from injury date denies defendant opportunity to set aside sufficient reserves).

62. *See, e.g.*, *Thomas v. Board of Trustees of Int'l Union of Operating Eng'rs, Local 542*, No. CIV.A.97-CV-2423, 1998 WL 334627, at *1 (E.D. Pa. June 24, 1998) (awarding interest from date contributions were refunded but not paid); *Teamsters Pension Trust Fund of Philadelphia & Vicinity*, No. CIV.A.95-7556, 1997 WL 11292, at *3-4 (E.D. Pa. Jan. 10, 1997) (awarding interest from day of entitlement to when pension vested), *aff'd*, 143 F.3d 139 (3d Cir. 1998); *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Plan & Trust Agreement*, 822 F. Supp. 247, 264-65 (E.D. Pa. 1993) (awarding interest from date defendants wrongfully withheld benefits); *Monfiletto v. John Hancock Healthplans, Inc.*, No. CIV.A.90-5137, 1992 WL 67891, at *7 n.1 (E.D. Pa. Mar. 24, 1992) (awarding interest from date of breach); *Pierce v. American Waterworks Co.*, 683 F. Supp. 996, 1000-02 (W.D. Pa. 1988) (awarding interest retroactively to date disability benefits were wrongfully withheld).

63. *See* *Ciarlante v. Brown & Williamson Tobacco Corp.*, No. CIV.A.95-4646, 1996 WL 741973, at *4 (E.D. Pa. Dec. 18, 1996) (awarding prejudgment interest from "date the complaint was served"), *rev'd on other grounds*, 143 F.3d 139 (3d Cir. 1998); *Kay v. Thrift & Profit Sharing Plan for Employees of Boyertown Casket Co.*,

strict courts exercise discretion and choose another appropriate period from which or during which interest will accrue.⁶⁴ Other district courts also exercise discretion when defining the starting date of accrual for prejudgment interest awards under ERISA; as a result, variations similar to the practice in the Third Circuit also exist in other jurisdictions.⁶⁵

3. *Rate of Interest*

No federal statute exists to govern the availability and rate of prejudgment interest.⁶⁶ As a result of this void and ERISA's silence on the availability of prejudgment interest, federal courts exercise discretion in fixing the rate at which interest accrues.⁶⁷

The Third Circuit has never adopted a rate to be used in the Circuit; instead, district courts exercise discretion.⁶⁸ Several district courts within the Third Circuit have reasoned that prejudgment interest arising under a

780 F. Supp. 1447, 1462 (E.D. Pa. 1991) (awarding interest based on rate obtained immediately prior to date plaintiff first demanded benefits).

64. See *Hardtke v. Exide Corp.*, 821 F. Supp. 1021, 1031 (E.D. Pa. 1993) (awarding prejudgment interest only during periods when plaintiff did not delay bringing suit); *Chacosky v. The Hay Group*, No. CIV.A-89-8083, 1191 WL 12170, at *7 (E.D. Pa. Feb. 1, 1991) (noting that fixing date at which prejudgment interest is to commence is discretionary and citing with approval *Valle v. Joint Plumbing Indus. Bd.*, 623 F.2d 196, 206-07 (2d Cir. 1980) (noting discretion to fix accrual date)). For example, in *Hardtke*, the District Court for the Eastern District of Pennsylvania, awarded prejudgment interest at interrupted intervals. See *Hardtke*, 821 F. Supp. at 1031. In the case, *Hardtke* was denied benefits on December 14, 1984. See *id.* He waited four years before filing a Writ of Summons in December of 1988. See *id.* *Hardtke* did not file a complaint until June 7, 1991. See *id.* Given these circumstances, the court opted not to award prejudgment interest during the period of delay between the filing of the Writ of Summons and the filing of the complaint. See *id.* The court, however, did award prejudgment interest from December 1984 to December 1988 and then from June 1991 until judgment. See *id.* at 1031-32 (awarding \$6,799.32). Interestingly, the court still awarded interest during the four year delay initially caused by the plaintiff's failure to file more expeditiously. See *id.*

65. See, e.g., *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 223 (1st Cir. 1996) ("Ordinarily, a cause of action under ERISA and prejudgment interest on a plan participant's claim both accrue when a fiduciary denies a participant benefits."); *Yarde v. Pan Am. Life Ins. Co.*, 67 F.3d 298, 301 (4th Cir. 1995) (exercising discretion to interpret when benefits were denied); see also GOTANDA, *supra* note 6, at 22-23 (describing same split in approach among state courts).

66. But see 28 U.S.C. § 1961 (1994) (establishing federal post-judgment interest availability and rate). For the text of § 1961, see *supra* note 20.

67. See Stephen A. Weiner & Frederick A. Brodie, § 68.14 *ERISA*, in *BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS* (Robert L. Haig ed., 1998) ("Federal courts have permitted the award of [prejudgment] interest to prevailing ERISA plaintiffs as a discretionary matter."); see also *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692, 696-97 (7th Cir. 1991) (stating that prejudgment interest is presumptively awardable to prevailing ERISA plaintiff).

68. For a discussion of courts of appeals that have addressed this issue, see *infra* notes 74-78 and accompanying text.

federal statute is a federal question that must be governed by federal law.⁶⁹ For example, in *Kann v. Keystone Resources, Inc.*,⁷⁰ the United States District Court for the Western District of Pennsylvania looked to the most analogous federal statute, the federal statutory post-judgment statute, and adopted its rate for use as the prejudgment interest as well.⁷¹ This rate

69. See *Kay v. Thrift & Profit Sharing Plan for Employees of Boyertown Casket Co.*, 780 F. Supp. 1447, 1462 (E.D. Pa. 1991) (awarding interest at § 1961 rate); *Pierce v. American Waterworks Co.*, 683 F. Supp. 996, 1001 (W.D. Pa. 1988) (same); *Kann v. Keystone Resources, Inc.*, 575 F. Supp. 1084, 1096 (W.D. Pa. 1983) (same).

Section 1961 provides district courts with the power to award post-judgment interest and sets its rate. See 28 U.S.C. § 1961 (1994). Some differences between the treatment of prejudgment and post-judgment interest arise in federal court actions depending on the source of the jurisdiction of the court. See GOTANDA, *supra* note 6, at 64-65. District courts are given original jurisdiction in two instances. See 28 U.S.C. § 1331 (1994) (defining federal question jurisdiction); 28 U.S.C. § 1332 (1994) (defining diversity jurisdiction). In actions arising under diversity jurisdiction, federal courts must apply state substantive law and federal procedural law. See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 465-74 (1965) (explaining doctrine of *Erie v. Tompkins*, 304 U.S. 64 (1938)).

In actions arising under diversity jurisdiction, post-judgment interest is generally considered a procedural matter; thus, the federal rate controls. See, e.g., *World Sav. & Loan Ass'n v. Jakubiec*, 793 F. Supp. 825, 826-27 (N.D. Ill. 1992) (noting that all but one Court of Appeals have ruled that federal post-judgment interest rate controls in diversity actions); *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 848 F.2d 613, 623 (5th Cir. 1988) (stating that "postjudgment interest is better characterized as procedural because it confers no right in and of itself"). Courts generally consider prejudgment interest, in contrast, as a substantive issue in matters arising under diversity jurisdiction. See, e.g., *In re Oil Spill by the Amoco Cadiz Off the Coast of France On Mar. 16, 1978*, 954 F.2d 1279, 1333 (7th Cir. 1992) ("In diversity cases . . . federal courts look to state law to determine the availability of (and rules for computing) prejudgment interest"); *Residential Mktg. Group, Inc. v. Granite Inv. Group*, 933 F.2d 546, 549-50 (7th Cir. 1991) (applying state prejudgment interest law in diversity).

The decision whether to apply a federal or state rate may have significant monetary impact. See GOTANDA, *supra* note 6, at 65 n.36. For example, in *Jakubiec*, the court applied the federal rate which was below 5%, instead of the 9% prescribed under Illinois law. See *Jakubiec*, 793 F. Supp. at 827.

70. 575 F. Supp. 1084 (W.D. Pa. 1983).

71. See *id.* at 1095 (noting that 28 U.S.C. § 1961 is most analogous statute); see also, e.g., *Thomas v. Board of Trustees of Int'l Union of Operating Eng'rs, Local 542*, No. CIV.A.97-CV-2423, 1998 WL 334627, at *13 (E.D. Pa. June 24, 1998) (awarding interest at § 1961 rate); *Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Littlejohn*, No. CIV.A.95-7556, 1997 WL 11292, at *4 (E.D. Pa. Jan. 10, 1997) (same), *aff'd*, 155 F.3d 206 (3d Cir. 1998); *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Plan & Trust Agreement*, 822 F. Supp. 247, 265 (E.D. Pa. 1993) (same); *Monfietto v. John Hancock Healthplans, Inc.*, No. CIV.A.90-5137, 1992 WL 67891, at *1 n.1 (E.D. Pa. Mar. 24, 1992) (same); *Kay*, 780 F. Supp. at 1462 (same); *Pierce* 683 F. Supp. at 1001 (same); *Kann*, 575 F. Supp. at 1095 (noting § 1961 is most analogous statute).

The *Kann* court dealt with an issue of first impression in the district courts of the Third Circuit. See *Kann*, 575 F. Supp. at 1096 ("We . . . believe this to be a case of first impression for the courts in the Third Circuit."). The court adopted the reasoning of the Eighth Circuit in the leading case holding prejudgment interest is available under ERISA, *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.

fluctuates and is "equal to the coupon issue yield equivalent . . . of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled."⁷² District courts have taken different approaches in selecting the applicable post-judgment rate, including using the rate existing at the time of demand for payment and averaging the rates from the applicable period.⁷³

Several circuits, including the United States Courts of Appeals for the Fifth, Sixth, Eighth and Ninth Circuits, have upheld the use of the federal post-judgment interest rate for prejudgment interest awards.⁷⁴ In contrast, the United States Courts of Appeals for the Fourth and Eleventh

1981), *cert. denied*, 454 U.S. 968 (1981). *See id.* at 1096 ("[W]e adopt the Eighth Circuit's holding that 28 U.S.C. § 1961, the most analogous section for post-judgment interest, is to be applied.").

One commentator criticized the rate of interest established in 28 U.S.C. § 1961. *See* Knoll, *supra* note 1, at 359. Professor Knoll argued that the federal rate is only appropriate when the federal government is the defendant because non-federal government defendants cannot borrow unsecured at the § 1961 rate. *See id.* As a result, the rate is generally too low and it will "encourage defendants to file excessive appeals," thus weakening the deterrent effects of awards. *Id.* This commentator suggested that a better approach would be also to use the prejudgment interest rate for calculating post-judgment interest. *See id.* at 293, 297, 308-11, 359 (advocating application of rate for prejudgment interest that reflects what defendant should pay for unsecured debt).

In addition, one district court awarded the rate requested by the plaintiff—even when the federal post-judgment rate would have been higher. *See Hardtke v. Exide Corp.*, 821 F. Supp. 1021, 1031 n.17 (E.D. Pa. 1993) ("Although [the § 1961] rate may well be greater than 6%, exercising our discretion, we limit our award to the relief requested.").

72. 28 U.S.C. § 1961 (1994).

73. *Compare Kay*, 780 F. Supp. at 1462 (awarding § 1961 rate "based upon the rate obtained immediately prior to the date that plaintiff first demanded his benefits"), *and Kann*, 575 F. Supp. at 1096 (awarding interest at rate existing when plaintiff first demanded payment), *with Pierce*, 683 F. Supp. at 1002 ("Due to the fluctuation of the postjudgment rate between . . . the date on which plaintiff would have started receiving pension benefits . . . and the date of this decision, we find that the prudent and fair course is to apply the average postjudgment rate for that period."). The United States Court of Appeals for the Ninth Circuit held that the applicable rate is the rate during the pendency of the injury, not the rate at the time of the judgment. *See Nelson v. EG & E Energy Measurements Group, Inc.*, 37 F.3d 1384, 1391 (9th Cir. 1994) (noting that § 1961 rate should be based on rate during injury).

74. *See, e.g., Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 619 (6th Cir. 1998) (affirming award at § 1961 rate); *Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1331 (8th Cir. 1995) (reversing prejudgment interest award at state rate and applying federal post-judgment interest rate); *Nelson*, 37 F.3d at 1391 ("We have held that the interest rate . . . under 28 U.S.C. § 1961 is appropriate for fixing the rate of pre-judgment interest 'unless the trial judge finds, on substantial evidence, that the equities of that particular case require a different rate.'" (quoting *Western Pac. Fisheries, Inc. v. S.S. President Grant*, 730 F.2d 1280, 1289 (9th Cir. 1984))); *Sweet v. Consolidated Aluminum Corp.*, 913 F.2d 268, 270 (6th Cir. 1990) (approving use of federal post-judgment interest rate); *Blanton v. Anzalone*, 760 F.2d 989, 992-93 (9th Cir. 1985) (applying federal post-judgment interest rate); *Dependahl*, 653 F.2d at 1218 (applying federal post-judgment rate); *see also* 60A AM. JUR. 2D *Remedies and Relief* §§ 1239-1240 (1988) (discussing prejudgment interest under ERISA).

Circuits have opted not to mandate the use of the federal post-judgment interest rate.⁷⁵ These courts upheld their district courts' incorporation of the prejudgment interest rate established by state law.⁷⁶ Moreover, the United States Court of Appeals for the Seventh Circuit upheld the use of the market rate.⁷⁷ This rate choice may have monetary significance because differences between the federal, state and market rates can decrease or increase a client's recovery or liability.⁷⁸

75. See, e.g., *Harrison v. Aetna Life Ins. Co.*, 50 F. Supp. 744, 749 (M.D. Fl. 1996) (using state statutory rates as analogy to fill gap in ERISA regarding prejudgment interest); see also *Smith v. American Int'l Life Assurance Co. of New York*, 50 F.3d 956, 958 (11th Cir. 1995) ("Because district courts have discretion in determining pre-judgment interest rates, we hold that district courts are not required to use section 1961(a) in computing such interest."); *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1030-31 (4th Cir. 1993) (upholding district court's use of state prejudgment interest rate); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 983-84 (5th Cir. 1991) (affirming award of prejudgment interest at state rate); *Fuchs v. Lifetime Doors, Inc.*, 939 F.2d 1275, 1280 (5th Cir. 1991) (upholding district court award of prejudgment interest at state rate); see also Stephen W. Mooney & Leigh Lawson Reeves, *Labor Law*, 47 MERCER L. REV. 891, 904-05 (1996) (discussing Eleventh Circuit's approach to awarding prejudgment interest under ERISA).

The courts that have opted not to use state rates cite uniformity in ERISA litigation as the reason; the federal rate provides predictability. See, e.g., *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 225 (1st Cir. 1996) ("Utilizing this rate promotes uniformity in ERISA cases."). For a list of cases, see *supra* note 75.

76. See *Hansen*, 940 F.2d at 984 (using Texas rate). The Court of Appeals for the Fifth Circuit held that state law may provide guidance when no federal statute is on point. See *United States ex rel. J.R. Canion v. Randall & Blake*, 817 F.2d 1188, 1193 (5th Cir. 1987) (stating that "[b]ecause the [federal act] is silent on the issue . . . state law is an appropriate source of guidance").

77. See *In re Oil Spill by the Amoco Cadiz Off the Coast of France on Mar. 16, 1978*, 954 F.2d 1279, 1332 (7th Cir. 1992) (stating that approximation of market rate is prime rate at various relevant periods during litigation); see also *Hizer v. General Motors Corp.*, 888 F. Supp. 1453, 1464 (S.D. Ind. 1995) (noting practice of Seventh Circuit to award prejudgment interest at market rates). The rationale for a floating rate as opposed to a fixed rate is that a fixed rate does not accurately compensate a prevailing party for the loss of the use of money for investments. See *Hizer*, 888 F. Supp. at 1463 (noting market rate is more accurate at compensating parties). For example, where a statutory rate results in overpayments, interest becomes punitive; where the rate underpays, the claimant is not adequately compensated. See *id.*

78. Compare Administrator of United States Court Statistics (chronicling period between October of 1982 and July of 1998, where § 1961 rate fluctuated, ranging anywhere from 3.13% to 12.17%), with ALASKA STAT. § 45.45.010 (1994) (awarding 10.5% fixed prejudgment interest), and D.C. CODE ANN. § 28.3302 (1991) (awarding 6% fixed prejudgment interest), and IND. CODE ANN. § 24-4.6-1-101 (West 1995) (awarding 8% fixed prejudgment interest), and MASS. GEN. LAWS ANN. ch. 231, § 6B (West 1995) (awarding 12% fixed prejudgment interest), and N.Y.C.P.L.R. § 5004 (awarding 9% fixed prejudgment interest) (McKinney 1992 & Supp. 1999). For a thorough discussion of the relative merits of each method of setting the rate, see generally Knoll, *supra* note 1.

D. *Interest on Delayed Payments*

Although the availability of prejudgment interest is settled when litigation establishes entitlement to the ERISA-governed funds, a conflict in authority exists in the district courts of the several circuits regarding whether interest is available on delayed payments under ERISA-governed plans.⁷⁹ In *Fotta*, the Third Circuit dealt with this issue of first impression and created an entitlement to interest on delayed payments under ERISA.⁸⁰

1. *Interest Available*

Prior to the *Fotta* decision, only one district court had upheld the availability of an independent cause of action for interest under ERISA absent an underlying judgment.⁸¹ The United States District Court for the Southern District of Indiana in *Hizer v. General Motors Corp. Allison Gas Turbine Division*⁸² likened an interest award for delayed payment to an award of prejudgment interest.⁸³ It held that in both instances, "interest is an essential element of complete relief for breach of an obligation to pay

79. Compare *Hizer*, 888 F. Supp. at 1456 (permitting cause of action to recover interest on delayed payments under ERISA), with *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 98-CV-1241, 1998 WL 901545, at *5-6 (E.D. Pa. Dec. 4, 1998) (denying cause of action for interest on delayed payments), *vacated in part on reconsideration*, No. CIV.A.98-CV-1241, 1999 WL 124392 (E.D. Pa. Feb. 5, 1999), and *DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F. Supp. 258 (S.D.N.Y. 1997) (same), and *Scott v. Central States, Southeast and Southwest Areas Pension Plan*, 727 F. Supp. 1095 (E.D. Mich. 1989) (same). For a further discussion of this split, see *infra* notes 81-94 and accompanying text.

80. See *Fotta v. Trustees of the United Mine Workers*, 165 F.3d 209, 214 (3d Cir. 1998) ("We now make explicit that interest is presumptively appropriate when ERISA benefits have been delayed."). For a discussion of this decision, see *infra* notes 95-132 and accompanying text.

81. See *Hizer*, 888 F. Supp. at 1461 (holding that interest is "essential element" of relief). In this case, Debra L. Hizer sought interest under an Indiana statute on the proceeds of a life insurance policy that her deceased husband purchased. See *id.* at 1456. A dispute arose over whether the policy took affect before Mr. Hizer's death. See *id.* As a result, the \$100,000 benefit was not paid until nearly five years after the death. See *id.* Because Mr. Hizer bought the policy pursuant to an employee benefit plan sponsored by General Motors, defendants argued that Hizer was not entitled to interest because ERISA preempts the Indiana statute providing for interest on delayed payments. See *id.* The court found that ERISA did preempt the Indiana statute. See *id.*; see also 29 U.S.C. § 1144(a) (1994) (preempting any state law that "relates to" an employee benefit plan). The court, however, went on to analogize interest on delayed payments to prejudgment interest, and the court awarded interest at the market rate for the period during which payment was delayed. See *id.*

82. 888 F. Supp. 1453 (S.D. Ind. 1995).

83. See *id.* at 1461 ("Defendants offer no rationale for drawing a distinction between prejudgment interest and interest on delayed payments, and none is apparent.").

benefits.”⁸⁴ Without an entitlement to interest, beneficiaries will not enjoy “the full benefits they are entitled to receive.”⁸⁵

Additionally, the *Hizer* court cited a deterrent policy rationale.⁸⁶ The court reasoned that not recognizing a right to interest “would create an incentive for benefit plans to delay payments and to retain for the plan the interest earned.”⁸⁷ Finally, the court held that legal entitlement to interest should not depend on whether a claimant has filed suit.⁸⁸ Because a plan administrator could be unjustly enriched whether or not there is a judgment on entitlement to benefits under ERISA-governed plans, the court saw no logical reason to distinguish between the two situations.⁸⁹

2. Interest Not Available

Two district courts within the Third Circuit had dealt with this issue prior to *Fotta*, both ruling that a cause of action for interest on delayed payments under ERISA is not available.⁹⁰ These courts, and other courts that have reached the same conclusion, characterized the nature of the remedy differently than the *Hizer* court.⁹¹

84. *Id.*; see RESTATEMENT (SECOND) OF CONTRACTS § 354, cmt. c (1979) (stating that interest is presumed recoverable for nonpayment once payment is overdue).

85. *Hizer*, 888 F. Supp. at 1461.

86. *See id.* (reasoning that if no interest is awarded, plans may delay to retain interest earned).

87. *Id.*

88. *See id.* at 1462 (“When a benefit has been erroneously denied or delayed, there is no reason why the legal entitlement to interest should depend on whether the claimant has actually won a judgment or even filed suit.”). The court likened this situation to common law contract principles. *See id.* (drawing analogy). It reasoned that when a party breaches a contractual obligation, interest is required from the due date of payment. *See id.* (discussing common law contract principles); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 354 and cmt. c. This interest is an “essential part of a complete contractual remedy.” *Hizer*, 888 F. Supp. at 1462. Additionally, the court noted that, under the common law, the breaching party cannot negate interest entitlement by merely paying the sum later—even if the late payment is made *before* judgment is entered. *See id.*

89. *See id.* (noting that compensatory policy of interest counsels finding entitlement to interest in this situation).

90. *See Holmes v. Pension Plan of Bethlehem Steel Corp.*, No. CIV.A.98-CV-1241, 1998 WL 901545, at *6 (E.D. Pa. Mar. 24, 1999) (holding that interest is not available), *vacated in part on reconsideration*, No. CIV.A.98-CV-1241, 1999 WL 124392 (E.D. Pa. Feb. 5, 1999); *Fotta v. Trustees of the United Mine Workers*, No. CIV.A.97-CV-00566 (W.D. Pa. 1998) (unpublished opinion) (same).

91. *See Holmes*, 1998 WL 901545, at *1 (holding that no cause of action exists for interest); *Fotta*, No. CIV.A.97-CV-00566 (same); *DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F. Supp. 258, 270-72 (S.D.N.Y. 1997) (same); *Scott v. Central States, Southeast & Southwest Areas Pension Plan*, 727 F. Supp. 1095, 1098 (E.D. Mich. 1989) (same).

In *Scott*, the defendant administratively approved plaintiff’s claim for pension benefits 12 years after plaintiff’s claim. *See* 727 F. Supp. at 1096 (noting delay). The court denied interest because the pension plan did not prescribe interest for delays in payments, thus, the court reasoned, the claim was extracontractual as barred in *Russell*. *See id.* at 1098. The *DeVito* court adopted the *Scott* court’s reason-

For example, in *Holmes v. Pension Plan of Bethlehem Steel Corp.*,⁹² the United States District Court for the Eastern District of Pennsylvania held that the awarding of interest is an "extracontractual remedy" because the terms of the plan do not provide for its award.⁹³ Because the Supreme Court in *Russell* held that extracontractual damages under ERISA are not available, an independent cause of action for interest would subvert this decision.⁹⁴

III. *FOTTA V. TRUSTEES OF THE UNITED MINE WORKERS*: THE THIRD CIRCUIT CREATES A NEW CAUSE OF ACTION FOR INTEREST AS "OTHER APPROPRIATE EQUITABLE RELIEF" UNDER ERISA

A. *Facts and Procedural Background of Fotta*

The United Mine Workers administered a pension plan under ERISA that provided disability insurance.⁹⁵ Abraham Fotta suffered a work-related injury on July 24, 1984, rendering him permanently disabled.⁹⁶ On

ing, holding that the lack of contractual provision regarding interest results in *Russell* barring the claim. See *DeVito*, 975 F. Supp. at 272.

92. No. CIV.A.98-CV-1241, 1998 WL 901545, at *1 (E.D. Pa. Dec. 4, 1998), *vacated in part on reconsideration*, No. CIV.A.98-CV-1241, 1999 WL 124392 (E.D. Pa. Feb. 5, 1999).

93. See *Holmes*, 1998 WL 901545, at *6 ("We will follow the overwhelming majority position in considering interest claims as extracontractual under ERISA."). This court subsequently reconsidered its decision in light of the *Fotta* decision. See *Holmes v. Pension Plan of Bethlehem Steel Corp.*, No. CIV.A.98-CV-1241, 1999 WL 124392, at *1 (E.D. Pa. Feb. 5, 1999). The Eastern District decided its case 11 days prior to the *Fotta* decision. See *id.* at *2. Following the *Fotta* decision, plaintiffs swiftly moved for reconsideration in light of the intervening change in controlling law. See *id.* at *1.

94. See *Scott*, 727 F. Supp. at 1096-97 (laying out argument that interest is extracontractual); see also *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) (holding that extracontractual damages are not available under ERISA). For a further discussion of the *Russell* decision, see *supra* notes 39-42 and accompanying text.

95. See *Fotta v. Trustees of the United Mine Workers*, 165 F.3d 209, 210 (3d Cir. 1998) (noting disability aspect of pension plan). For a summation of the relevant facts in *Fotta*, see generally Molly J. Liskow, *Even Though No Lawsuit Was Needed, Late Payment of Benefits Does Permit Suit to Recover Interest Under ERISA*, NEW JERSEY LAWYER: THE WEEKLY NEWSPAPER, Jan. 11, 1999, at 74.

96. See *Fotta*, 165 F.3d at 210-11. U.S. Steel/USX Corporation employed Fotta at the Maple Creek Mine for eight years. See *Fotta v. Workmen's Compensation Appeal Board (U.S. Steel/USX Corp. Maple Creek Mine)*, 626 A.2d 1144, 1145 (Pa. 1993). On July 23, 1984, while working in the mine, Fotta slipped from the machine he was riding, falling approximately two feet to the ground. See *id.* He then filed a claim for benefits under the Pennsylvania Worker's Compensation Act. See *id.*; see also 77 PA. CONS. STAT. ANN. §§ 1-1031 (West 1992). In the claim, Fotta alleged that he injured his right ankle and foot during the fall. See *Fotta*, 626 A.2d. at 1145. Fotta's claim was reviewed twice and denied twice. See *id.* The referee of the first review dismissed the claim after finding that Fotta's disability was not due to a work-related injury. See *id.* The referee found that the injury was caused by a pre-existing tumor known as a pigmented villonodular synovitis. See *id.* The Worker's Compensation Appeal Board affirmed the decision. See *id.* The Ap-

September 1, 1993, the Supreme Court of Pennsylvania upheld the causal relationship between Fotta's work and his disability under the Pennsylvania Worker's Compensation Act.⁹⁷

As a result of this ruling, the Trustees granted Fotta disability benefits under ERISA with an effective date of September 1, 1993.⁹⁸ The Trustees, however, subsequently revised this effective date and granted Fotta disability benefits effective August 1, 1984.⁹⁹ Fotta received back payment in the amount of \$21,600 reflecting disability benefits from August 1, 1984 to September 1, 1993.¹⁰⁰ Fotta then demanded interest on this back payment, and the Trustees refused.¹⁰¹

Fotta sued the Trustees in the United States District Court for the Western District of Pennsylvania.¹⁰² The Western District dismissed the complaint for failure to state a claim.¹⁰³ Fotta then appealed this ruling to the United States Court of Appeals for the Third Circuit.¹⁰⁴

B. *The Third Circuit's Decision*

In *Fotta*, the Third Circuit recognized a cause of action for delays in payment of ERISA-governed benefits even when the claimant does not resort to litigation under ERISA to recover the payment.¹⁰⁵ The Third Cir-

peal Board, however, allowed Fotta to resubmit his claim in light of new medical reports. *See id.* At the second hearing, Fotta offered two medical reports, which were rebutted by the employer's expert. *See id.* The referee cited the employer's expert testimony as the basis for the decision to deny benefits. *See id.* at 1146. After this second dismissal, Fotta appealed to the Board which affirmed the decision. *See id.* Fotta then appealed to the Commonwealth Court. *See id.* A divided panel affirmed the decision. *See id.* The majority reasoned that the Board committed no error by relying on one expert over the other when faced with conflicting reports. *See id.* The dissent concluded that the Board misconstrued the evidence that Fotta's accident at work contributed to the disability. *See id.* Fotta then appealed to the Supreme Court of Pennsylvania which granted allocatur. *See id.* The Supreme Court held that a causal relationship did exist between the injury at work and the disability and upheld Fotta's entitlement to disability benefits under Pennsylvania law. *See id.* at 1147. For a discussion of the significance of this case for proving sufficiency of medical evidence, see Peter J. Weber, *Survey of Significant Developments in the Law*, 66 PA. B. ASS'N. Q. 16, 20-21 (Jan. 1995).

97. *See Fotta*, 626 A.2d at 1147 (upholding Fotta's claim). For a summary of the facts of the case, see *supra* note 96.

98. *See Fotta*, 165 F.3d at 211 (noting initial effective date for disability payments).

99. *See id.* (noting revised effective date).

100. *See id.* (noting amount of back payment awarded).

101. *See id.* (noting Trustee's refusal to award interest to Fotta on his disability payments).

102. *See id.* (noting Fotta filed suit).

103. *See id.* (noting decision of district court).

104. *See id.* (reviewing Fotta's appeal). Judge Sloviter authored the opinion to which Judge Scirica joined, and Judge Alito wrote a concurring opinion. *See id.* at 210, 215.

105. *See id.* at 214 (creating cause of action for interest under ERISA for delayed pension payments).

cuit initially noted the novelty of the issue presented in this case, both in the Third Circuit and among the several circuits.¹⁰⁶ In deciding that interest is available on delayed benefits without litigation to recover the payment, the Third Circuit interpreted ERISA's provision permitting "other appropriate equitable relief" to include this independent cause of action for interest.¹⁰⁷ In reaching its decision, the Third Circuit relied on several factors including: 1) Congress' silence on whether interest is available is not dispositive; 2) as a policy matter, interest should be available; 3) interest is not extracontractual in nature; and 4) interest is equitable in nature, and ERISA provides textual support for awarding equitable relief.¹⁰⁸

1. *Silence Not Dispositive*

The Third Circuit rejected the Trustee's argument that ERISA's silence on whether interest may be awarded for a delay in payment was dispositive in this case.¹⁰⁹ Precedent establishes that Congress intended federal courts to develop a body of federal common law to refine ERISA as to remedies available under the Act.¹¹⁰ The court reasoned that recognizing this cause of action would be a proper exercise of its power to develop the law of remedies under ERISA because of the similarity between this interest and prejudgment interest.¹¹¹ The Third Circuit previously recognized in *Schake* and *Anthuis* that a plan beneficiary could seek prejudgment interest despite no express provision permitting it in ERISA.¹¹²

106. See *id.* at 211 (stating appeal raises issue of first impression).

107. For a continuing discussion of this holding, see *infra* notes 105-32 and accompanying text.

108. For a discussion of these factors, see *infra* notes 109-30 and accompanying text.

109. See *Fotta*, 165 F.3d at 211-12 (rejecting argument that ERISA's silence bars interest recovery).

110. See *id.* (rejecting argument that because Congress did not explicitly provide for cause of action on delayed benefits payments it is not available under ERISA); see also *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987) (stating that Congress intended for judges to develop body of federal law "to deal with issues involving rights and obligations under private welfare and pension plans") (quoting 120 CONG. REC. 29,942 (1974) (statement of Sen. Javits)); *Bollman Hat Co. v. Root*, 112 F.3d 113, 118 (3d Cir. 1997) (stating that development of federal ERISA common law is appropriate only when "necessary to fill in interstitially or otherwise effectuate the statutory pattern enacted in the large by Congress"), *cert. denied*, 118 S. Ct. 373 (1997).

111. See *Fotta*, 165 F.3d at 212 ("It is of considerable moment that we have previously recognized that a beneficiary may seek prejudgment interest in a suit to recover benefits due, notwithstanding the lack of an express directive from Congress to that effect."). For a discussion of the *Schake* and *Anthuis* cases, in which the Third Circuit recognized a cause of action for prejudgment interest, see *supra* notes 46-58 and accompanying text.

112. See *id.* (noting Third Circuit recognition of prejudgment interest claims under ERISA). The Third Circuit noted that the *Anthuis* decision is particularly important for the recognition of general power to award prejudgment interest because ERISA explicitly provides for its award in a defined area of cases, *i.e.*, delin-

Thus, statutory silence alone did not bar recognizing the cause of action.¹¹³

2. *Extending Prejudgment Interest Rationale*

The Third Circuit used the *Schake* and *Anthuis* holdings as a basis for the proposition that interest could be awarded despite ERISA's silence.¹¹⁴ More importantly, however, the court used the similar policy justifications between prejudgment interest and interest on delayed payments to support its finding that, as a policy matter, interest *should* be recoverable.¹¹⁵

The court cited two policies furthered by an award of prejudgment interest, and it reasoned that these policies would be furthered by an award of interest on delayed payments even without litigation establishing entitlement to the benefits.¹¹⁶ First, the court noted that a claimant cannot be made whole because a "late payment effectively deprives the beneficiary of the time value of his or her money whether or not the beneficiary secured the overdue benefits through a judgment as the result of ERISA litigation."¹¹⁷ Second, the court held that "unjust enrichment principles also apply with equal force."¹¹⁸ The court reasoned that in the absence of a cause of action for interest, plan administrators may be tempted to delay payment and to retain interest that rightfully belongs to the beneficiary.¹¹⁹

quent employer contributions under 29 U.S.C. § 1132 (g)(2)(B) (1994). *See id.* (discussing *Anthuis* decision).

113. *See id.* at 211.

114. *See id.* at 212 (noting Third Circuit jurisprudence recognizing prejudgment cause of action under ERISA).

115. *See id.* ("The principles justifying prejudgment interest also justify an award of interest where benefits are delayed but paid without the beneficiary's having obtained a judgment."). For a discussion of the underlying policy justifications of prejudgment interest, see *supra* notes 21-26 and accompanying text.

116. *See id.* (noting prejudgment interest policy concerns to "mak[e] claimant whole and prevent[] unjust enrichment"). The United States District Court for the Western District of Pennsylvania, subsequent to *Fotta*, aptly noted that "the *Fotta* decision does not prioritize these justifications and each of them can yield a different interest award." *Holmes v. Pension Plan of Bethlehem Steel Corp.*, No. CIV.A.98-CV-1241, 1999 WL 179794, at *2 (E.D. Pa. Mar. 24, 1999). If the main purpose is to give restitution, then the measure should be the benefits the plaintiffs actually lost by not having the money. *See id.* If, in contrast, the main purpose is to deter unjust enrichment, then disgorgement of what the defendants actually earned on the withheld money is the proper measure. *See id.* at *3. These measures may differ, and a court will balance the equities in determining which policy rationale is most appropriate for each particular case. *See, e.g., id.*

117. *Fotta*, 165 F.3d at 212. For a discussion of why a claimant is arguably not made whole without an award of interest, see *supra* notes 21-26 and accompanying text.

118. *Id.*

119. *See id.* (theorizing about financial incentive that may result from contrary holding); accord *Hizer v. General Motors Corp.*, (Allison Gas Turbine Division), 888 F. Supp. 1453 (S.D. Ind. 1995) (upholding right to pursue interest on delayed benefits).

3. *Interest Not "Extracontractual Damages"*

Although the Third Circuit reasoned that interest should be available, the court needed to rebut an argument attempting to bar its recovery. The district court in *Fotta* relied on the Supreme Court's *Russell* decision that barred extracontractual damages under ERISA.¹²⁰ The Third Circuit addressed this argument in two ways. First, it confined the *Russell* holding to bar extracontractual damages to the specific enforcement provision at issue in that case—not the "other appropriate equitable relief" provision.¹²¹ Second, and more importantly, the court held that claims for interest are not "extracontractual" as intended by the *Russell* Court.¹²² The court held that the interest sought in this case was compensatory in nature, and Supreme Court precedent regards interest for late payment as "an implicit part of a contractual obligation to pay money."¹²³

4. *Interest as "Other Appropriate Equitable Relief"*

The Third Circuit went on to characterize the awarding of interest as an equitable remedy.¹²⁴ It then reasoned that this cause of action is permitted under the provision providing for "other appropriate equitable re-

120. See *Fotta*, 165 F.3d at 213 (noting that district court relied on *Russell* case to deny interest). For a discussion of *Russell*, see *supra* notes 39-42 and accompanying text.

121. See *id.* (noting *Russell* did not address whether extracontractual damages may be sought under 29 U.S.C. § 1132 (a)(1)(B) (1994)).

122. See *id.* (noting that *Fotta* is not seeking consequential or punitive damages, but rather compensatory interest).

123. *Id.* The Supreme Court has held that interest is an implied incident of a contract. See *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1989) (stating that "prejudgment interest traditionally has been considered part of the compensation due plaintiff"); *Spalding v. Mason*, 161 U.S. 375, 396 (1896) ("Every one who contracts to pay money on a certain day knows that, if he fails to fulfill his contract, he must pay the established rate of interest as damages for his nonperformance. Hence it may correctly be said that such is the implied contract of the parties.").

124. See *Fotta*, 165 F.3d at 213. The Third Circuit cited to its own jurisprudence on interest. See *id.* In the prejudgment interest area, the Third Circuit held that interest is "given in response to considerations of fairness and denied when its exaction would be inequitable." *Anthuis v. Colt Indus. Operating Corp.*, 971 F.2d 999, 1009 (3d Cir. 1992); see *Liberty Lincoln-Mercury v. Ford Motor Co.*, 134 F.3d 557, 574 (3d Cir. 1998) (noting that prejudgment interest is equitable remedy under New Jersey law); *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 616 (3d Cir. 1991) ("When deciding whether to award prejudgment interest to a party, a court must consider 'whether countervailing equitable considerations militate against such a surcharge.'" (quoting *American Mut. Liab. Ins. Co. v. Kosan*, 635 F. Supp. 341, 346 (W.D. Pa. 1986))).

The Third Circuit rejected the argument that equitable relief only involves injunctions. See *Fotta*, 165 F.3d at 213-14. Money damages when viewed as restitution to remedy unjust enrichment are "widely, if not universally, regarded as a tool of equity." *Id.*; see, e.g., *Chauffeurs, Teamsters & Helpers, Local 391 v. Terry*, 494 U.S. 558, 570 (1990) (stating that money damages are considered equitable when "they are restitutionary").

lief" under ERISA.¹²⁵ Although the Supreme Court cautioned against "engraft[ing] a remedy on a statute,"¹²⁶ the Third Circuit remained confident that the equitable nature of this cause of action—fully compensating a beneficiary for the time value of money—falls under the "other appropriate equitable relief" provision, despite the congressional silence.¹²⁷ The Third Circuit simply viewed its decision as creating federal common law to effectuate the objectives of ERISA.¹²⁸ In conclusion, the Third Circuit noted that, because this is an equitable remedy, all equitable defenses,

125. See *Fotta*, 165 F.3d at 213 ("Fotta's claim for interest is appropriately raised under Section [1132 (a)(3)(B)], the civil-enforcement provision relating to equitable relief."). Fotta invoked two of ERISA's civil enforcement provisions as justification for awarding this interest. See *id.* at 211 (invoking 29 U.S.C. §§ 1132 (a)(1)(B) (1994) and 1132 (a)(3)(B) (1994) as textual basis for interest claim). The first provision generally provides plan beneficiaries with the right to sue to recover benefits under an ERISA-governed plan. See *id.* This subsection states in relevant part, "A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan [or] to enforce his rights under the terms of the plan . . ." § 1132 (a)(1)(B). The second provision permits a plan beneficiary "to obtain other appropriate equitable relief" to redress violations of ERISA or to enforce any provision of ERISA or the terms of the benefit plan. See *Fotta*, 165 F.3d at 211 (noting Fotta's argument based on § 1132 (a)(3)(B)).

126. *Massachusetts Mut. Ins. Co. v. Russell*, 473 U.S. 134, 145 (1985); see *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (noting Supreme Court's "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" (quoting *Russell*, 473 U.S. at 146-47 (emphasis in original))).

127. See *Fotta*, 165 F.3d at 214 (noting that this remedy falls within ERISA provision providing for "other appropriate equitable relief").

128. See *id.* (citing authority to develop ERISA common law). The court noted that ERISA requires courts to define the proper remedial scope of its provisions. See *id.* (noting interpretative power); see also *Russell*, 473 U.S. at 157 (Brennan, J., concurring) ("ERISA was not so 'carefully integrated' and 'crafted' as to preclude further judicial delineation of appropriate rights and remedies; far from barring such a process, the statute explicitly directs that courts shall undertake it."); *Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Littlejohn*, 155 F.3d 206, 208 (3d Cir. 1998) ("In a situation where the statute does not provide explicit instructions, it is well settled that Congress intended that the federal courts would fill in the gaps by developing, in light of reason, experience, and common sense, a federal common law of rights and obligations imposed by the statute.").

One commentator has severely criticized the pro-active role of courts in creating federal common law under ERISA. See Brauch, *supra* note 38, at 543 (criticizing courts claiming to be filling gaps in ERISA and arguing that "the only gap is between ERISA as it is written and ERISA as the courts wish it has been written"). This commentator warned:

When courts create federal common law interpreting plan terms and creating defenses to congressionally specified remedies, they are effectuating Congress's choices. But when courts create new federal common-law claims or remedies omitted from ERISA by Congress, they are effectuating their own choices . . . Congress, not the federal courts, is in the better position to make these policy choices. Congress, not the federal courts, is directly accountable to the people.

Id. at 604-05.

such as laches, will apply.¹²⁹ In addition, the court emphasized that interest is “presumptively appropriate when ERISA benefits have been delayed.”¹³⁰

5. Concurrence

In a concurring opinion, Judge Alito emphasized that the law of trusts could also provide a foundation for the equitable relief sought in this cause of action.¹³¹ In addition, he seemingly departed from the majority opinion by noting that plaintiffs are entitled to interest as “appropriate equitable relief” only when they prove that the “trustees *violated the plan* by failing to pay . . . benefits on time.”¹³²

IV. PRACTICAL APPLICATION

A. Significance of Fotta

Fotta is a watershed development in the Third Circuit’s ERISA remedy jurisprudence.¹³³ Because it recognizes a new cause of action, counsel

129. See *Fotta*, 165 F.3d at 214 (“And like other equitable remedies, it is subject to equitable defenses such as laches.”). Laches is an equitable defense barring claims where the equities in a case counsel against allowing the claim to succeed. See 27A AM. JUR. 2D *Equity* § 199 (1996) (defining laches). The lapse or nonlapse of the statutory period of limitations is one factor, albeit not a decisive one, to be considered under the doctrine. See generally *Gardner v. Panama R. Co.*, 342 U.S. 29, 30-31 (1951) (“[T]he matter [of laches] should not be determined merely by a reference to and a mechanical application of the statute of limitations.”); *Russell v. Todd*, 309 U.S. 280, 293 (1940) (finding that statute of limitations does not apply when remedy is exclusively equitable); *Meade v. Pension Appeals & Review Comm.*, 966 F.2d 190, 195 (6th Cir. 1992) (holding that laches did not bar action to collect disability benefits under terms of ERISA-governed pension plan where claim was brought within most analogous state statute of limitations period and where prejudice was not shown).

130. *Fotta*, 165 F.3d at 214.

131. See *id.* at 215 (Alito, J. concurring) (citing to hornbook law and caselaw on trusts as support for this decision). This conclusion is significant because one commentator has noted that:

[G]iven Congress’s reliance on trust law in establishing ERISA’s fiduciary duties and its decision to limit relief to equitable relief, the legislative history [while inconclusive as to remedies intended by Congress] is at least consistent with the notion that such remedies consist of those available at common law for breach of trust.

Lopez, *supra* note 35, at 346.

132. *Fotta*, 165 F.3d at 215 (Alito, J. concurring). For a discussion of the significance of Judge Alito’s emphasis that the “trustees violated the plan,” see *infra* notes 148-53 and accompanying text.

133. See Timothy J. Snyder, *Court Determines Interest is Payable on Delayed Benefit Payments*, 4 NO. 2 DEL. EMPLOY. L. LETTER 4 (Feb. 1999) (noting newness of cause of action). One practitioner in the area noted:

If you are like me, you have probably stuck to the belief that interest is not payable on the delayed payment of benefits from an . . . (ERISA) benefit plan. Well, the Third Circuit has shattered that myth in what the court has characterized as a case of first impression . . . not only in the Third Circuit but in all federal circuits.

should be ready to use it to their clients' advantage.¹³⁴ In addition, because an interest award can be substantial, counsel for plaintiffs and defendants should litigate the issue.¹³⁵

The Third Circuit established a presumption that its courts should award interest.¹³⁶ The court's decision, however, seemingly only affects pension plans that are silent as to whether interest is available on delayed payments.¹³⁷ Thus, carefully drafted pension plans can solidify the awarding of interest or negate the presumption by providing that it is not available.¹³⁸ A reasonable rate of interest may also be set in the plan.¹³⁹

Because this cause of action is independent from underlying litigation on the merits establishing entitlement to ERISA-governed funds, the ten-day, post-judgment motion limit articulated by the Supreme Court in *Os-*

Id. But see *Brauch*, *supra* note 38, at 541 (criticizing several courts' creation of federal common law under ERISA as too extensive).

134. See *Snyder*, *supra* note 133, at *1 (opining "[t]his case opens the floodgates for litigation by anyone who believes that the payment of benefits has been delayed").

135. See Robert B. Fitzpatrick, *Damages and Other Remedies in Employment Cases*, SC08 ALI-ABA 895, 935 (June 17, 1997) (noting practical necessity of vigorously advocating clients' interests); see, e.g., *Hardtke v. Exide Corp.*, 821 F. Supp. 1021, 1031-32 (E.D. Pa. 1993) (awarding damages in the amount of \$20,000.35 and \$6,799.32 in interest); *GOTANDA*, *supra* note 6, at 1-2 (noting that interest awards can be substantial because of length of litigation or delays in establishing entitlement to sum).

136. See *Fotta*, 165 F.3d at 214 (establishing presumptive right to interest on delayed payments under ERISA-governed plans).

137. See *id.* at 211 (noting plan's silence on whether interest is available). Although the court does not specifically address the Trustees' contention that "because . . . the plan [does not] expressly provide for the relief that Fotta seeks, Fotta's claim must fail," it implicitly rejects the argument with its holding. *Id.*

138. See, e.g., *Scott v. Central, Southeast & Southwest Areas Pension Plan*, 727 F. Supp. 1095, 1098 (E.D. Mich. 1989) (holding that because pension plan is silent on issue, interest is extracontractual and thus barred under *Russell*). Providing for the award of interest in the pension plan itself will negate the arguments used by the district courts characterizing this interest as extracontractual. See *id.* at 1095-96.

139. See *Hizer v. General Motors Corp.*, (Allison Gas Turbine Division), 888 F. Supp. 1453, 1464 (S.D. Ind. 1995) (warning that rates built into pension plans must be reasonable). The *Hizer* court noted in dicta:

Although not presented here, this analysis raises a practical question that could be important to many plans: May benefit plans enforce plan provisions that establish the interest rate or a method of calculation for delay in payment of benefits? Generally, participants and beneficiaries of ERISA plans will have no ability to bargain over plan terms. It would defeat the policies of ERISA, for example, to allow a plan sponsor to embed in a plan an artificially low interest rate for delay in payment of benefits. However, the law usually favors a contractual solution over a judicial one. As long as plans adopt a reasonable way to calculate the interest . . . then it appears the plan terms should control the precise details of the calculation.

Id. at 1464 n.8.

terneck seems inapplicable.¹⁴⁰ Other time constraints may, however, be more noteworthy. The majority's indication that the equitable doctrine of laches may bar recovery can be used by plan administrators attempting to limit an interest award.¹⁴¹ The District Court for the Eastern District of Pennsylvania interpreted the contours of the laches defense after the *Fotta* decision.¹⁴² In that case, the court noted that, under Pennsylvania law, the laches defense normally follows the statute of limitations unless fraud or concealment is shown.¹⁴³ It went on to hold that the appropriate statute of limitations is Pennsylvania's general six year period.¹⁴⁴ The court, exercising its discretion, did not award interest on withheld money before the six-year period, but did calculate it for money withheld within the statute of limitations period.¹⁴⁵ Although the laches defense may be relatively straightforward, other contours of this momentous Third Circuit decision seem less than clear.¹⁴⁶

140. For a discussion of *Osterneck*, see *supra* notes 57-58 and accompanying text.

141. See *Fotta*, 165 F.3d at 214 (noting that all equitable defenses attach to new cause of action).

142. See *Holmes v. Pension Plan of Bethlehem Steel Corp.*, No. CIV.A.98-CV-1241, 1999 WL 124392, at *2 (E.D. Pa. Feb. 5, 1999) (noting that Third Circuit indicated that equitable defense of laches applies).

143. See *id.* (noting that tolling of statute of limitations will not occur unless fraud or concealment by defendant is present); see also *United Nat'l Ins. Co. v. J.H. France Refractories Co.*, 668 A.2d 120, 124 (Pa. 1995) (articulating general Pennsylvania rule that laches follows statute of limitations unless fraud or concealment is shown).

144. See *Holmes*, 1999 WL 124392, at *3 (deciding among several statute of limitations options). The court noted that under 29 U.S.C. § 1132, there is no set time limitation on bringing claims. See *id.*; see also *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1179 (3d Cir. 1992) (noting absence of time limit). The Third Circuit noted that three possible limitations periods exist under 29 U.S.C. § 1132. See *id.* at 1180-81. First, Pennsylvania's Wage Payment and Collection Law, 43 PA. CONS. ANN. § 260.9 (West 1992), contains a three year limitations period. The court held that delinquent pension payments are not sufficiently analogous to wage payments to merit this time period. See *Holmes*, 1999 WL 124392, at *3. Second, there is a four year statute of limitations for pension benefits that have not yet become payable. See *Gluck*, 960 F.2d at 1181. The court found this rate inapplicable because the pension benefits had already become due. See *Holmes*, 1999 WL 124392, at *3. Because these possible rates did not apply, the court defaulted to Pennsylvania's general six year statute of limitations. See *id.* The statute of limitation is not, however, always determinative of the laches period.

145. See *Holmes v. Pension Plan of Bethlehem Steel Corp.*, No. CIV.A. 98-CV-1241, 1999 WL 179794, *1 (E.D. Pa. Mar. 24, 1999) ("[W]e also held that the applicable statute of limitations precludes Plaintiff's claims for interest on deficient pension payments that were made before March 9, 1992, six years prior to this lawsuit's filing.").

146. See *Snyder*, *supra* note 133, at *1 ("One thing I am sure of: There will be subsequent opinions from the Third Circuit regarding the payment of interest from benefit plans.").

B. *Unanswered Questions*1. *Period of Accrual: Interest on All Retroactively Paid Benefits?*

Similar to prejudgment interest, when a district court awards interest, it must determine the accrual period. In this case, accrual could occur from several points including from the beginning date of coverage or retroactive payments, from when entitlement to the benefit or sum is legally solidified or from the date within the applicable statute of limitations under a laches defense. It is unclear whether interest should be presumptively available on all retroactively paid benefits even if payments are delayed in accordance with the terms of an ERISA-governed plan.¹⁴⁷ For example, interest may not be appropriate when a plan provides that a disability pension will not be payable until the Social Security Administration (SSA) declares a participant disabled.¹⁴⁸ This situation is exemplified in *Fotta*—interest accrual may begin at the rise of disability or at the point that the Supreme Court of Pennsylvania upheld *Fotta*'s rights to receive disability payments.¹⁴⁹ A plan seemingly cannot be violated if its terms require that administrative or judicial steps be taken prior to a beneficiary being entitled to payments. Because the terms of the plan itself require this process, retroactively paid benefits accruing from the inception of the disability may not be “delayed” for purposes of this decision.¹⁵⁰ Thus, defining “delayed” is crucial, and some inconsistency may exist between the majority and concurrence on this point.¹⁵¹

147. *See id.* at *2 (noting uncertain scope of *Fotta*'s presumption of availability of interest on delayed payments under ERISA).

148. *See id.* at *2 (providing example when interest arguably will not be available under *Fotta*).

149. For a discussion of the discretion exercised by district courts to set accrual dates, see *supra* notes 59-65 and accompanying text. Presumably, the district courts will exercise discretion in setting the accrual date, similar to the prejudgment interest arena. The lack of clarity in this opinion, however, may result in courts expanding or restricting the Third Circuit's ruling depending on which date is used. For example, if the Third Circuit intended for interest to accrue on any delayed payment, then *Fotta* would be entitled to, absent any laches defense, interest running from the rise of the disability in 1984. *See Fotta*, 165 F.3d at 210. In contrast, if the Third Circuit intended for interest to accrue only when the terms of the plan are violated, interest would accrue only after the Supreme Court of Pennsylvania upheld his claim for disability—from 1997 on. *See id.* (noting decision to uphold disabled status).

150. *See id.* at 210-11 (noting that once disability is shown, entitlement to payments will be retroactive to date of inception of disability, but that this situation may not constitute “delayed” payments as intended by Third Circuit).

151. *Compare Fotta*, 165 F.3d at 214 (“We therefore hold that a beneficiary of an ERISA plan may bring an action for interest on delayed benefits payments under section [1132](a)(3)(B) of ERISA, irrespective of whether the beneficiary also seeks to recover unpaid benefits.”), *with id.* at 215 (Alito, J., concurring) (“If the plaintiff in this case can establish that the trustees *violated the plan* by failing to pay his benefits on time, an award of interest would constitute ‘appropriate equitable relief.’”) (emphasis added). The concurrence seems to be either clarifying the majority's holding or attempting to restrict it to instances where the terms of the plan are violated. *See Snyder, supra* note 133, at *2 (noting concurrence may be

The concurring opinion's emphasis that the trustees "violate[] the plan" may be viewed as clarifying the reach of the majority opinion, which fails to mention such a restriction or as attempting to restrict its reach.¹⁵² If the policy justifications cited by the majority, however, are to be taken seriously, a plaintiff may be denied full compensation and the fund may be unjustly enriched even if the terms of the plan itself necessitate delay in payment due to administrative action or tangential litigation.¹⁵³ Practitioners should use the uncertainty created by this decision to further their clients' positions until the Third Circuit clarifies its holding.

2. *Rate of Interest*

In addition to the ambiguity regarding the accrual period, the Third Circuit did not suggest an interest rate to be awarded in this new cause of action.¹⁵⁴ District courts, similar to the prejudgment interest area, will exercise discretion in fixing the rate.¹⁵⁵ Because of the *Fotta* court's emphasis on the similarity between this interest and prejudgment interest, district courts within the Third Circuit may opt to award the rate they would award for prejudgment interest.¹⁵⁶

The United States District Court for the Eastern District of Pennsylvania took this approach after *Fotta*.¹⁵⁷ The court awarded restitution interest at the prejudgment interest rate—in this case, it selected the postjudgment rate under 28 U.S.C. § 1961.¹⁵⁸ Because the § 1961 rate fluctuates, however, "the complexity of different interest rates . . . makes the computation . . . unworkable."¹⁵⁹ The court thus averaged the appli-

clarifying extent of holding). One commentator has opined that the language of the concurrence stating that the trustees must "violate[] the plan," suggests that interest may not be presumed appropriate in cases of retroactive interest awards when the delay is in accordance with the terms of the plan. See *id.* (interpreting concurrence).

152. See *Fotta*, 165 F.3d at 215 (Alito, J., concurring) (stating that if plaintiff can prove trustees violated plan by failing to pay benefits on time, then plaintiff will have cause of action); see also Snyder, *supra* note 133, at *2 (opining that concurrence seems to clarify extent of majority's decision).

153. See *Fotta*, 165 F.3d at 212 (citing policy justifications for decision). For a more thorough discussion of the policy justifications underlying prejudgment interest and interest on delayed payments, see *supra* notes 21-29 and accompanying text. For a discussion of the conflict between the two policy justifications, see *supra* note 116.

154. See *id.* at 214-15 (failing to address rate of interest).

155. See *id.* at 214 (remanding for district court to exercise discretion to award interest and to set rate).

156. For a discussion of the prejudgment rates employed by district courts within the Third Circuit, see *supra* notes 68-73 and accompanying text.

157. See generally *Holmes v. Pension Plan of Bethlehem Steel Corp.*, No. CIV.A.98-CV-1241, 1999 WL 179794 (E.D. Pa. Mar. 24, 1999) (applying analysis similar to that used in prejudgment area).

158. See *id.* at *3.

159. *Id.* For the text of 28 U.S.C. § 1961, see *supra* note 20.

cable § 1961 rates.¹⁶⁰ Moreover, the court awarded simple interest, calculated daily and compounded yearly, which accrued from the first reduced payment until the date of its opinion.¹⁶¹ Because the Third Circuit, however, has never adopted an official rate and there exists a circuit split on appropriate interest rates,¹⁶² practitioners should argue for the federal postjudgment rate, the state rate or a prevailing market rate—whichever is more favorable to their clients' pecuniary interests.¹⁶³

CONCLUSION

The fate of this new cause of action is not certain.¹⁶⁴ In the interim before final resolution of its availability, the Third Circuit and its district courts may round out the contours of the *Fotta* decision, and practitioners

160. See *id.* Other courts also use this averaging method. See, e.g., *Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 619 (6th Cir. 1998) (using averaging method); *Webb v. GAF Corp.*, 949 F. Supp. 102, 108-09 (N.D.N.Y. 1996) (same); *Pierce v. American Waterworks Co.*, 683 F. Supp. 996, 1001-02 (W.D. Pa. 1988) (same).

161. See *Holmes*, 1999 WL 179794, at *4. Note that postjudgment interest may accrue from the date of this judgment. For a discussion of the common law rules that developed in reference to compound and simple interest, see *supra* note 16.

162. For a discussion of the Third Circuit and other circuit approaches, see *supra* notes 68-78 and accompanying text.

163. See, e.g., *Slater v. Texaco, Inc.*, 506 F. Supp. 1099, 1115-16 (D. Del. 1982) (noting rate of prejudgment interest is within discretion of court and should be set with regard to particular circumstances of case); N.J. Ct. R. 4:42-11 (a)(ii) ("For judgments not exceeding the monetary limit of the Special Civil Part at the time of entry . . . the annual rate of interest shall equal the average rate of return, to the nearest whole or one-half percent, for the corresponding preceding fiscal year terminating on June 30, of the State of New Jersey Cash Management Fund (State accounts) as reported by the Division of Investment in the Department of the Treasury"); N.J. Ct. R. 4:42-11 (a)(iii) ("[F]or judgments exceeding the monetary limit of the Special Civil Part at the time of entry . . . at the rate provided in subparagraph (a)(ii) plus 2% per annum"); 41 PA. CONS. ANN. § 202 (West 1992) (setting legal rate of interest in Pennsylvania at 6% per annum); *American Enka Co. v. Wicaco Mach. Corp.*, 686 F.2d 1050, 1057 (3d Cir. 1982) (holding that under Pennsylvania law, prejudgment interest is awarded at statutory rate [6%] from date cause of action arose). For example, the amount in interest recovered can be great, depending on the rate employed. See, e.g., *Smith v. American Int'l Life Assurance Co. of New York*, 50 F.3d 956, 957 (11th Cir. 1995) (awarding prejudgment interest at state rate of 12% as opposed to federal rate set at 3.54%).

164. This Casebrief did not aim to analyze the merits of the *Fotta* decision, but rather aimed to explain the current state of the law in the Third Circuit. It should be noted, however, that several courts have criticized this decision. See *Kerr v. Charles F. Vatterott & Co.*, No. CIV.A.98-1677, 1999 WL 493996, *6 (8th Cir. July 12, 1999) (stating, "To the extent that *Fotta* may be read to allow recovery of interest as extracontractual or consequential damages, we respectfully disagree with that holding" and denying interest on payments delayed three and one half years); *Walsh v. Eastman Kodak Co.*, 53 F. Supp. 2d 569, 574-75 (W.D.N.Y. 1999) (noting Third Circuit decision, stating "no evidence that any similar rule has been adopted" in the Second Circuit exists and denying interest for 25-day delay). Moreover, this split in authority combined with recent criticism of the creation of federal common law may prompt parties to seek review in the Supreme Court of the United States.

in this area should follow these cases and the cases in other courts regarding this issue closely.¹⁶⁵

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165. Other courts may help explain the reach of *Fotta*. Subsequent to the Third Circuit's decision, the Court of Appeals for the Eighth Circuit held that a plan participant who received all accumulated funds could not recover additional interest amounts under ERISA. *See Kerr*, 1999 WL 493996, at *1 (denying interest on payments delayed three and one half years). The Eighth Circuit held that the Supreme Court limited recovery under § 1132(a)(3)—the “other appropriate equitable relief” section—to “classic equitable remedies such as injunctions, restitutionary, or mandamus relief, and does not extend to compensatory damages.” *Id.* at *4 (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256-58 (1993)). The court noted that arguments regarding notions about the underlying policy of ERISA cannot supplant § 1132's express language. *See id.*

The court entered a discussion regarding whether the availability of interest on delayed payments is restitution or compensation. *See id.* The court noted that restitution may be equitable or compensatory. *See id.* The court focused on whether the defendant actually made gains that can be disgorged or whether the defendant was unjustly enriched as opposed to whether an interest award would fully compensate the plaintiff. *See id.* The Third Circuit, however, cited both rationales in its opinion. The Eighth Circuit, in contrast, limited its reading of *Fotta* to permitting interest awards as equitable restitution when they disgorge the interest earned by the plan in the delay. *See id.* at *6. If the Eighth Circuit rationale is followed, recovery may depend simply on whether the defendant did, in fact, gorge benefits, and the availability of the cause of action may depend on the characterization of the claim as unjust enrichment to the defendant.